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89-5120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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NUMBER 89-

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MICHAEL OWEN PERRY,

PETITIONER,

VERSUS

STATE OF LOUISIANA,

RESPONDENT.

---

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

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## QUESTIONS PRESENTED FOR REVIEW

## ISSUES PRESENTED

I. Do the Eighth and Fourteenth Amendments of the United States Constitution prohibit a State from forcibly injecting an insane death row inmate with mind-altering drugs when such drugs are not being used for treatment but are administered solely in an attempt to make him competent to be executed?

II. Is it unconstitutionally cruel and unusual punishment to circumvent the Ford v. Wainwright, 477 U.S. 399 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986) prohibition of executing the insane by forcibly injecting the insane inmate with dangerous mind altering drugs in an attempt to make him sane, particularly when the Court's order imposes no limits whatsoever on these injections?

III. What standard applies to determine whether a Louisiana inmate is competent to be executed?

IV. Does that standard, the Eighth Amendment and Ford v. Wainwright, 477 U.S. 39, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986) prohibit the execution of a person who has been unanimously diagnosed as suffering from a major psychotic illness; whose sanity, even on medication, varies from moment to moment; and who varies "like a moving target" in his appreciation for the crime for which he was convicted and the punishment which he has been condemned to suffer?

V. Is the Fourteenth Amendment violated when the Trial Court receives ex parte communications from the Department of Corrections and then relies upon these in reaching its decision to order forcible injections, without giving the defense notice or opportunity to be heard? Is it a denial of the right to counsel for the Court to have the inmate interviewed without counsel being notified or being allowed to be present?

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Petitioner, MICHAEL OWEN PERRY, prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court filed May 12, 1989, and states:

## CITATIONS TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming, on direct appeal, Petitioner's conviction and sentence of death may be found at 502 So.2d 543 (La. 1986) and is set out at pages 1-22 of the appendix. [1]

The denial of petitioner's application for appeal or in the alternative writ of certiorari to the Louisiana Supreme Court on the question of forcible medication is published at _____ So. 2d _____ (La. 1989) and is set out at App. 23. The denial of petitioner's application for rehearing to the Louisiana Supreme Court is published at _____ So. 2d _____ (La. 1989) and is set out at App. 24.

The remaining orders and rulings raising the questions presented for review are not published and are set out at App. 25 - These include:

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[1] Appendix citations shall be cited as "App.___".



1. The order of the trial court setting a hearing on the issue of competency to be executed (App. 25).

2. The August 26, 1988 ruling of the trial court, overruling defendant's objection to the use of ex parte materials submitted to the Court by the Louisiana Department of Corrections (App. 26-29).

3. The Trial Court's order of August 31, 1988, ordering that weekly reports submitted to the Court by the Louisiana Department of Corrections be entered as evidence (App. 30).

4. The trial court's October 21, 1988 reasons for judgment implicitly finding Michael presently incompetent and ordering forcible medication to achieve competence (App. 31-61).

5. The Trial Court's October 21, 1988 judgment ordering forcible medication (App. 62).

## JURISDICTIONAL STATEMENT

This application seeks review of a judgment of the Louisiana Supreme Court, entered May 12, 1989, denying petitioner's appeal and alternative application for writ of certiorari. Petitioner's timely application for rehearing was denied June 16, 1989.

The statutory ground for jurisdiction of this Court lies in 28 U.S.C. 1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

the Sixth Amendment which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ... and have the assistance of counsel for his defence.

the Fourteenth Amendment which provides in relevant part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor

deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Louisiana statutes which are set out in the Appendix:

1. La. R.S. 28:171 at App. 63-65
2. La. R.S. 15:830 at App. 65
3. La. R.S. 15:830.1 at App. 65
4. La. Code Crim. P. Art. 641 at App. 66
5. La. Code Crim. P. Art. 647 at App. 66
6. La. Code Crim. P. Art. 648 at App. 66-67



## STATEMENT OF THE CASE

### A. Statement of Facts

Michael Perry was convicted of five counts of first degree murder including the deaths of his mother and father. The conviction and sentence are not at issue in this application except as they may relate to the issue of sanity and competency to be executed.

Michael has an extensive history of mental illness and was found incompetent to proceed to trial several times. He was committed to Feliciana Forensic Facility, an institution for the criminally insane. Prior to this offense, Michael had a history of civil commitments to Central Louisiana State Hospital. No issue of malingering exists as all four doctors testified that they believed Michael to be genuinely ill and the Trial Court ruled that Michael has made a sufficient threshold showing that his competency is in doubt (Tr. 4/88 p. 5-6 App. 68-69).

The physicians who examined Michael for the competency hearing unanimously agreed that he is suffering from schizo-affective disorder, a major mental illness. One psychiatrist described schizoaffective disorder as:

> Schizoaffective disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also has a problem with his feeling tone or the defective [sic - affective] component. When they are in the state of acute illness, they usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifest[] symptoms like not wanting to sleep, not wanting to talk of having crying adversity. The problem is also that they would have some distortion in their thinking....

As shown by the doctors' reports (App. 127-138) and testimony at the competency hearing in April, 1988, this disease manifests in Michael as psychosis, disordered and inconsistent thinking, and auditory hallucinations. Michael believes he is God, hears voices, is fixated on numbers, is paranoid and delusional. Dr. Aris Cox, a board-certified forensic psychiatrist who is Michael's treating psychiatrist at Louisiana State Penitentiary testified that "I

don't think I've ever seen Michael, even on medication, be completely coherent, well-integrated, rational."

B. Course of Prior Proceedings

Michael Perry was convicted of first degree murder and sentenced to death in 1985. In affirming Michael's conviction and sentence (State v. Perry 502 So. 2d 543 (La. 1986)), the Louisiana Supreme Court reiterated Louisiana's position that this State does not execute the insane (State v. Allen, 15 So. 2d 870 (La. 1943)) and questioned whether Michael was competent to be executed in light of this prohibition and Ford v. Wainwright 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed. 2d 355 (1986).

In January, 1988, the Trial Court on its own motion scheduled a hearing to determine Michael's competency. Three psychiatrists and a clinical psychologist were appointed and examined Michael.

A hearing was held on April 20, 1988. The purpose of that hearing as stated by the Court was:

> "Just let me say, of course, the purpose of this hearing today is that under the Supreme Court decision in this case cited at 502 So. 2d 543, the Louisiana Supreme Court in 1986 said that the State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime....The Supreme Court then steered defense counsel to apply to the trial court for appointment of a sanity commission to make such a determination. And, of course, counsel has done that....[2]"

Tr. 4/88 hearing p. 5 App. 68.

Michael presented evidence consisting of: (1) testimony of the psychiatrists and psychologist (2) medical records from Central State Hospital, an out-patient mental health clinic, Feliciana Forensic, and Louisiana State Penitentiary (3) Michael's videotaped testimony.[3] The State chose to present no evidence (Tr. 4/88 hearing p. 199 App. p. 108). Defendant's evidence was unrebutted.

[2]Counsel did not make such an application. The Trial Court raised the issue by issuing an order for counsel to appear. App. 25.

[3] Hearings were held on four separate days and are cited herein by date. For example, testimony given at the April, 1988 hearing is cited as "Tr. 4/88 p. _____". Extracts of the testimony are included in the Appendix.



Although all evidence was completed and the case submitted on April 20, the Court did not rule, asked for briefing, and set the ruling for May 26, 1988. The Court postponed the ruling date several times and finally set it for August 26, 1988.

In the interim between April 20 and August 26, the Court ex parte requested the State of Louisiana to provide weekly reports on Michael to the Court WITHOUT PRIOR NOTICE, WITHOUT CROSS-EXAMINATION, AND OVER DEFENSE OBJECTION.[4]

On August 26, 1988 the Court again did not rule on Michael's competence but it did make the following rulings (App. 26-30):

1. Michael's objection to consideration of the ex parte weekly reports was overruled.
2. These reports were filed into the record.
3. A prior order, appointing counsel as decision-maker for the incompetent Michael Perry, was revoked.[5]
4. Based on the ex parte weekly reports, the Court decided not to rule whether Michael was competent either to be executed or to proceed.
5. The Court scheduled a new hearing for September 30, 1988.
6. Dr. Cox and Dr. Jiminez were ordered to reexamine Michael and testify at the new hearing.
7. The Court ordered Michael TO BE FORCIBLY MEDICATED WITH PSYCHOTROPIC DRUGS BY THE STAFF OF LOUISIANA STATE PENITENTIARY UNTIL SEPTEMBER 30, 1988.

Counsel contemporaneously objected to all of these rulings and to the Court's failure to rule on the April evidence and noticed intention to take writs to the Louisiana Supreme Court (Tr.

[4]Michael's written objection to this uncross-examined, ex parte evidence is included in App 139.

[5]The motion requesting this appointment is contained in App 141. This motion was granted in January, 1988. When counsel first met Michael Perry, it was immediately obvious that Michael was insane. Michael was unable to assist counsel in the most basic decisions affecting his life. Evidence was presented to the Court explaining counsel's dilemma and this order resulted. Additionally, counsel contacted the Louisiana State Bar Association and requested guidance. Counsel was told that, while the Bar acknowledged counsel's obligations under Code of Professional Responsibility Rule 1.14, the Bar would not provide any assistance in applying this rule to Michael's predicament.

8/88 p. 8 App. 114). On August, 29, 1988 the Louisiana Supreme Court stayed the forcible medication ruling leaving the remainder of the writ application pending (App. 144).

On September 30, 1988 a hearing was held before the Trial Court. Over Mr. Perry's objection, testimony of Dr. Kay Kovac and Dr. Aris Cox was received. This hearing was then continued until October 21, 1988, at which time testimony was taken from Dr. Teresita Jiminez. Following this testimony, the Trial Court rendered the following judgment:

1. The Trial Court declared that "...Michael Owen Perry is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment" (Order, 10/21/88, App. 62.)
2. However, the Court added that "it is further obvious from the testimony that he is competent only while maintained on psychotropic medication in the form of Haldol." (Tr. 10/21/88 p. 44, App. 57.)
3. The Trial Court ordered Michael forcibly medicated, declaring that "...Louisiana's interest in the execution of that jury's verdict override[s] those rights of Mr. Perry [to refuse forcible treatment]" (Tr. 10/21/88 p. 43-44, App. 56-57.)

The Trial Court then stayed all action under this order and declined to sign a death warrant until "the [Louisiana] Supreme Court makes a ruling one way or the other." (Tr. 10/21/88 p. 47, App. 60). This stay has not been lifted and is still in effect. The Trial Court suggested that this order is an "appealable judgment" within the meaning of La. Code Crim. P. 912. Mr. Perry also noticed his intention to raise all previous issues via supervisory writs in the event the order was not appealable.

On May 12, 1989, the Louisiana Supreme Court denied the application for certiorari and denied an appeal (App. 23). An application for rehearing was timely filed but was denied by the Louisiana Supreme Court on June 16, 1989 (App. 24).



All constitutional issues raised in this application were specifically raised to the Trial Court and to the Louisiana Supreme Court. Contemporaneous objections were lodged to all rulings of the Trial Court (Tr. 8/88 p. 8 App. 28 objecting to consideration of ex parte evidence; Tr. 10/88 P. 44 App. 57 objecting to the Court's order of forced medication and to the Court's finding concerning competency).

## ARGUMENT AND REASONS FOR GRANTING THE WRIT

**I. THE EIGHTH AMENDMENT AND LOUISIANA LAW PROHIBIT THE EXECUTION OF THE INSANE. THE LOWER COURT'S ORDER THAT PETITIONER, AN INSANE INMATE, BE FORCIBLY MEDICATED WITH PSYCHOTROPIC DRUGS FOR AN INDEFINITE TIME IN AN ATTEMPT TO CREATE COMPETENCY AND IS CONTRARY TO FORD V. WAINWRIGHT, 477 U.S. 39 (1986).**

**II. WHAT STANDARD APPLIES TO DETERMINE WHETHER A LOUISIANA INMATE IS COMPETENT TO BE EXECUTED?**

### A. EIGHTH AMENDMENT ANALYSIS/CONTEMPORARY STANDARDS

In Ford, supra, this Court prohibited the execution of one who has become insane since conviction. The original purpose of the April, 1988 hearing was to evaluate Michael in light of Ford and Louisiana's prohibition (per Allen, supra) against executions of the insane. However, when the Trial Court reopened the hearing and interjected the question of medication, the issue changed. The new issue which the Trial Court's ruling has created is:

> Given that it is unconstitutional to execute the insane and given that Michael, in his unmedicated state, is insane, can the State of Louisiana forcibly medicate him with psychotropic drugs to try to achieve competency for execution?

This case thus presents a question which is based on Ford but goes beyond Ford: May a State, consistent with the Eighth Amendment, attempt to make an inmate, who is undeniably insane, sane through the use of drugs when those drugs are given solely for the purpose of execution, not for treatment?

The issue is res nova as applied to a capital defendant. Those

states which have considered similar issues have answered this question in the negative. Louisiana has answered this question in the affirmative. A conflict, therefore, exists as to a State's constitutional ability to forcibly drug prisoners.

Ford expressed the horror which is felt in confronting the prospect of executing someone who did not understand his fate. This Court found that this same horror was felt nationwide and listed in Footnote 2 thirty seven states which prohibit the execution of the insane. This Court concluded that this consensus reflected the "evolving standards of human decency" which are the benchmark of the Eighth Amendment and, by those standards, the Eighth Amendment must prohibit such executions:

> ...[T]he intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

Ford, supra at 2602

This same analysis mandates the conclusion that forcible medication, as ordered by the Trial Court in Michael's case, is prohibited by the Eighth Amendment.

App.___ contains a survey of state statutes providing for medication of inmates, their procedures for dealing with insane inmates, and the limitations imposed on forcible medication. All states which have the death penalty prohibit the execution of sentence when the defendant is incompetent. Of these states, one automatically commutes the sentence to life imprisonment. Thirty (30) states commit the defendant civilly for treatment.

Most states also impose limitations and conditions on the use of treatments that are drastic and intrusive. For example, at least twenty five (25) states prohibit forcible treatment absent a medical emergency or prohibit the use of treatment or medication for non-medical purposes. Thirteen (13) other states prohibit the use of extreme treatments, e.g., lobotomies. Psychotropic drugs have been classified as equally intrusive and extreme as lobotomies and electroshock surgery (Guardianship of Roe 421 N. E. 2d 40



(Mass. 1981)).

Louisiana has joined the majority of states in prohibiting the execution of the insane (Allen, supra; Perry, supra). Louisiana has also joined the majority of states in affording treatment to insane inmates and in imposing limits on the use of forced medication.

Louisiana's statutes on pre-trial competence state:

> La. Code Crim. P. Art. 648A -
> If the Court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the custody of the Department of Health and Human Resources or a private institution...for custody, care, and treatment as long as the lack of capacity continues.

Code Crim. P. Art 648B then deals with a situation where the person is found to be a danger to himself or others and is unlikely to regain competence in the foreseeable future. That section states:

> ...the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment.

The Louisiana Supreme Court has held (State v. Henson 351 So. 2d 1169 (La. 1977)) that these articles, although originally enacted to deal with incompetency prior to trial, apply equally to incompetency that arises after conviction.

Louisiana also has specific statutes dealing with inmates who become insane. La. R.S. 15:830 requires that, when an inmate becomes insane the "Secretary of the Department of Corrections shall initiate legal proceedings" to have him committed to the Department of Health and Human Resources. If an inmate refuses medication, La. R.S. 15:830.1 provides, again in mandatory terms, that the Department shall file a petition, the Court shall determine competence, and if incompetent shall commit the prisoner for treatment in accordance with civil commitment procedures. La. R.S. 15:830.1 states:

> A. Whenever a mentally ill...inmate refuses treatment and any staff physician, staff psychiatrist or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days.... If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting

forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill...inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided....

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety Corrections that has been designated by the Department of Health and Human Resources and Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this section shall be in accord with all procedures required by law in the case of judicial commitment....

There are several key words in this statute. The first is the word "treatment". The only purpose for which forcible medication is permitted is to treat the inmate for his mental condition. Such medication is permitted only if the inmate poses a danger to himself or others.

The statute also specifies what the trial court is supposed to do - make a finding of competence or incompetence to refuse his medication. Non-consensual medication is permitted only upon a finding of incompetence.

Most significantly, section B and C mandate that the inmate be committed to a treatment facility in accordance with all procedures required by law for civil commitments. By adding this section, the Legislature made applicable to insane prisoners the provisions of the Mental Health Law contained in La. R.S. 28:1 et seq. This includes La. R.S. 28:171 which guarantees rights to all mental patients. Those rights include:

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility....

F. No patient confined by...judicial commitment...shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient.... Medication shall



not be used for nonmedical reasons such as punishment or for convenience of the staff.

These statutes, as well as comparable ones from other states, show a fundamental commitment to human dignity and a recognition that "even" the insane and "even" insane inmates are entitled to protection from non-consensual, intrusive, and potentially harmful "treatment" by the State. These statutes permit a State to override an individual's personal rights and dignity only when some higher value is at stake such as to prevent the inmate from harming himself or others.

On their face, these statutes do not expressly exclude inmates condemned to death. On their face, they apply to all inmates and all civilly committed persons. Of the thirty states that authorize civil commitment and treatment for an insane death row inmate, no state has expressly authorized the use of forcible medication to establish competency for execution.

Thus this case is not as "simple" as Ford where the "contemporary standards of human decency" were discernable in statutes and jurisprudence. The question presented by Michael's case is one of integrating and resolving the tension among expressed policies:

1. Louisiana authorizes executions and the State has an interest in seeing such a sentence carried out.
2. However, Louisiana and the majority of states prohibit executions of the insane.
3. Louisiana and the majority of states impose limits on the use of forcible and intrusive "treatment".

The unanswered question is how, under the Eighth Amendment, to integrate or balance the States' expressed prohibitions against intrusive treatment and against executions of the insane against the State's interest in carrying out a death sentence.

The Trial Court did not make such an analysis. It focused primarily on the death sentence and concluded that, whatever other policies there may be and whatever Michael's interests and rights, these were outweigh by the state's interest in carrying out

Michael's sentence (Tr. 10/88 p. 42-44 App. 55-56.). Under the Eighth Amendment, the state's interest is not the only focus. The question is whether what the state is attempting to do is so cruel and unusual, in light of standards of decency, that the State's power must be limited. The majority of states including Louisiana have expressed the policy that there must be limits on the use of extreme medical procedures even when those procedures are used under the supervision of a physician and for treatment purposes. That expression of the state's commitment to human dignity, even for inmates, must temper the State's interest in carrying out this death sentence. The unlimited and unfettered "prescription" of drugs to try to achieve sanity - i.e., to circumvent the constitutional prohibition against execution of the insane - is more offensive than such executions themselves. It too is unconstitutional.

B. PROPORTIONALITY

In Thompson v. Oklahoma, ___ U.S. _____, 108 S. Ct. 2687, 2698 (1988), this Court stated "Although judgments of Legislatures, juries and prosecutors weigh heavily in the balance, it is for [this Court] ultimately to judge whether the Eight Amendment permits imposition of the death penalty" on a particular defendant. The use of drugs in this case, given Michael's history, the scope of the Trial Court's ruling, and the testimony from the examining doctors, is degrading, arbitrary, cruel, unusual, excessive and, therefore, unconstitutional.

There is no doubt that Michael suffers from schizoaffective disorder (Tr. 10/88 hearing p. 38, 145 App. 51.) This condition is incurable (Tr. 4/88 p. 55, App. 76). All that psychotropic drugs do is abate some of the symptoms so Michael appears more normal and so he can mouth the words necessary to "pass" whatever



test of insanity may be applied.[6] But how reliable is this "mouthing of the right words" especially when the answers change from day-to-day or minute-to minute as in Michael's case?

One of the characteristics of Michael's disease is inconsistency in thinking, or "ambivalence".

> A. (From Dr. Jiminez) He was not consistent in the information that he gave me. He went from thinking he did not--from saying he did not do the act to saying that he did it out of anger.
>
> Q. Okay, so we can add to that that he's also inconsistent in statements that he gives to you, right?
>
> A. Yes sir, very ambivalent about things. (Tr. 4/88 hearing p. 21 App 70)
>
> ...
>
> Q. Now when we say he understood his sentence, the death penalty, how were you able to conclude that he understood it? What component of it did he understand? What was it you explained or did he ask questions of you?
>
> A. (From Dr. Jiminez) The first thing Mr. Perry said to me when I went to see him was, uh, I asked him if he remembered me and he said he did. And I said, do you know why I am here. And he said to me, you are here to help me stay alive, is what he said to me. And I said, why do you say that. And so we started talking about what his present condition and about what he had done that ended up in his incarceration and the penalty that he had. So that's when he first told me that he did not kill the family, that somebody else killed them, in fact, that man that killed them also had taken a shot at him in the head. Then at the later part of the interview that's when he said at the end that he was very angry with his mother and called her all kinds of names. And he said that the little boy was also a bastard and that his sister was insane. He started being derogative towards the family and stated that he did kill them. So he does understand that he killed them and that he is scared to die. So I say yes to those last questions that you asked. My apprehension with him is he does get ambivalent and he know--he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness. (Tr. 4/88 hearing p. 35-36 App 73-73).

Dr. Cox found the same inconsistencies.

> Q. And on each occasion do you take the opportunity to discuss his charges, his fate, the penalty he faces?
>
> A. (From Dr. Cox) Yes, sir, I attempt to.
>
> Q. Okay. And have you succeeded in bringing up those

[6]When Dr. Jiminez saw him in September, the question posed to Michael was: "And, again I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him....".

subjects in each of your visits?

A. Sometimes I have and sometimes I haven't. As I indicated the first of March when I saw him I was able to and we had a very good discussion about it. There have been times when I've not been so successful.

Q. All right. And why were you prevented from being successful in you discussion with him?

A. Because I thought he was--my answer to that is when I was unable to do so he was so out of contact with what was going on that he really wasn't able to answer the questions. He would tell me things like he was God and he couldn't be killed.

Q. And that's a symptom of, in your opinion...

A. In my opinion, in his case, it's a delusion which is a symptom of his illness. (Tr. 4/88 hearing p. 78 App 84).

And so did Dr. Vincent:

Q. Now in your discussions did he appear to understand the reason that he was going to be executed?

A. That's a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

Q. Did he acknowledge that he committed these murders to you or did he deny it?

A. He did both. At one point he said that he committed the murders. We talked about that briefly. Two minutes later I was asking another question and he said that he felt that he could be found innocent because he was in Washington, D.C. at the time.... He was very inconsistent. (Tr. 4/88 hearing p. 129-130 App. 91-92).

And of course there is Michael's "testimony":[7]

Q. Michael, what is your name, please?

A. Perry, Michael Owen, God--I was God when I was seven years old. I remember that. And I'm innocent, I didn't do it. (Tr. 4/88 hearing p. 168 App. 101)

...

Q. Michael, if they put God in the electric chair what's going to happen?

A. You'd kill me dead, I mean in twenty years that's the last report, you know. I mean I did ninety percent,

[7]Michael's insanity causes rambling incoherence and pressured speech. Because of difficult in transcribing this testimony and capturing on the record the emotional changes and body language accompanying Michael's testimony, the Trial Court granted permission to videotape Michael's testimony to preserve it for appellate review.



you know, but I believe he's God, you know. I mean he knows the man and, uh, I don't like to cry and I told you I wouldn't try to cry but, uh, I mean that's how I made it first, you know. And, uh, I love my wife, you know, and I don't want to lose her, and I don't want to lose ya'll because ya'll the first ones that helped me. And I didn't do it what ya'll trying to say that I did it. I am crazy, nine percent, I go with that, that's for the money, you know. (Tr. 4/88 hearing p. 169-170 App.102-103.)

...

A. ...So to answer your question, I didn't do it. But I know who did. But that's going to cost you twenty million dollars before I can answer your question.

Q. If I paid you twenty million dollars you'd tell me who committed the murders?

A. Yes, sir, I would tell you ninety-million dollars. (Tr. 4/88 hearing p. 173-4 App 104-105).

...

Q. (By the Court) And you understand that the jury found you guilty? Or do you understand that the jury found you guilty of committing those five murders?

A. But they want me to pay the price.

Q. Do you know that the jury found you guilty of committing those five murders?

A. I didn't know that. They told me innocent.... (Tr. 4/88 hearing p. 177-178 App 106-107).

Which version is "the truth"? What, <u>if anything</u>, does Michael really understand about the crime, his conviction, or sentence? What the doctors' testimony and Michael's statements demonstrate is that Michael's comprehension of what happened and of his plight changes minute to minute. Is that "competence", "understanding"?

Dr. Cox, who has the most complete, recent knowledge of Michael's condition (Tr. 4/88 hearing p. 58 App 79) describes him as a "moving target".

Q. Is schizoaffective disorder something of which he can be cured?

A. No, sir.

Q. It's like diabetes, it's always going to be with him to a greater or lesser degree?

A. In my opinion, yes. It's something that can be managed like diabetes and sometimes it will be worse or sometimes it will be better but it's going to be there.

[8] Michael has never been married however has the delusion that he married a Susan Annette Bordelon when he was <u>seven</u> years old. The theme of numbers, specifically 7 and 90 appear throughout Michael's testimony.

Q. And there's no way to predict when he will become psychotic even when he's on medication?

A. It's hard to predict with a hundred percent accuracy.

Q. Doctor, out in the hall, you indicated that Michael was, quote, a moving target. Would you explain to the Court what you meant by that?

A. I have seem him on and off medication several times now and I have seen him respond to medication. When I saw him back on the 3rd of March he looked about as good to me then as I've ever seem him look. At that time I thought he probably was competent.[9] He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not.... (Tr. 4/88 p. 58-59 App 79-80).

This Court has repeatedly stated that the death penalty is different. The proof required to impose the ultimate penalty must be strong and reliable (Woodson v. North Carolina 428 U.S.280 (1976); Gardner v. Florida 430 U.S. 349 (1977)). That penalty cannot be imposed in an arbitrary and capricious fashion (Furman v. Georgia 408 U.S.238 (1972). So how is Michael's execution to be carried out? Can the state wait until a "good day" and execute Michael? Can Michael be executed if his "good days" outnumber his "bad days" by some amount? What amount? And what happens if the date set by the death warrant is a "bad day"?

In Ford, this Court stopped the execution of an inmate who became insane subsequent to his conviction but did not establish a mandatory standard for defining insanity. Justice Powell's concurrence suggested that "the Eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it (p. 2609)" and that "States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum" (p. 2608).

It is respectfully submitted that the Louisiana standards to determine competency to be executed are indeed more stringent than

[9]Two days later when Dr. Vincent saw him he was floridly psychotic (Tr. 4/88 p. 100 App 89).



those enunciated by Justice Powell.[10] However, the Trial Court in Michael's case did not apply the Louisiana standard; the Trial Court used a standard similar to Justice Powell's concurrence which is not Louisiana law or constitutionally required. Accordingly, the Trial Court erred when it failed to take into account the guiding principles of the Louisiana statutory scheme and jurisprudence.

Louisiana Code Crim P. Art. 641 states:

> Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Since State v. Allen 15 So. 2d 870 (La. 1943), the Louisiana Supreme Court has applied this statutory scheme in the context of post-trial competence to be executed. In short, Allen extends by analogy the competency to stand trial articles to post-conviction situations.[11] In Allen, the Louisiana Supreme Court found that before a defendant will be executed, competency must be demonstrated, "[F]or the same reason that a person is entitled to a hearing before a conviction on the question of his sanity, he is entitled to a hearing after conviction; and the same rules of procedure govern" (Allen, supra at 871).

In Perry, supra, the Louisiana Supreme Court reapproved the application of Allen to post-conviction determinations of competency to be executed. The Perry decision affirms Allen. Perry also clarifies the burden of proof in a proceeding to determine competency to be executed:

1. A defendant bears the burden to prove present insanity, citing Allen with approval;

[10]See 47 La. L. Rev. 1351, 1359 and 1364 and FN 62 (1987) supporting the position that Louisiana provides greater substantive and procedural safeguards than Ford.

[11]Interestingly, however, the Trial court found that because of State v. Allen, supra and State v. Perry, supra, "therefore, procedurally, it appears we are governed by the Code of Criminal Procedure and, therefore, do have a set of statutes to work with". The error then committed by the Trial Court is its failure to apply La. Code Crim. P. Art. 641 to Michael's case as required by Allen.

2. A defendant proves present insanity by a preponderance of evidence; and

3. A defendant must show he lacks the "present capacity to undergo execution" Perry, supra at 564.

Since Perry's "present capacity to undergo execution" simply incorporates the standards for competency as set forth in the code articles on pre-trial competency. Louisiana cases interpreting those code articles define the test that should have been applied to Michael. The leading case interpreting these articles is State v. Bennett 345 So. 2d 1129 (La. 1977).

Under Bennett a condemned person must understand the nature of the proceedings against him, i.e., understand that he has been sentenced to death for his having committed the crime; and he must participate with an informed appreciation in the execution of that sentence. Lastly, he must be able to assist in his defense i.e., he must be able to provide meaningful assistance in the defense of his life. Michael Perry does not understand the nature of the proceedings against him and cannot currently assist counsel to proceed in any meaningful present or future representation regarding post-conviction relief.

To subject Perry's competence simply to the test stated in Justice Powell's concurrence derogates from what that concurrence stated - namely, that a State can provide greater protection. Louisiana jurisprudence and the Louisiana Constitution do provide greater protections. They just weren't accorded to Michael.

In fact what the Trial Court's October, 1988 order attempts to do is to circumvent Michael's present insanity by ordering forcible medication. But forced medication does not cure the random capriciousness and disorientation of Michael's thinking and behavior. Michael was on medication at the time he was examined by each of the doctors who testified at the April, 1988 hearing (Tr. 4/88 p. 23, 55, 100 App 71,77,79) yet each of them found him to be schizoaffective, paranoid, inconsistent and disordered in his thinking and understanding.

Indeed forced medication makes Michael's plight even more



offensive because what is being done here is an experiment to try to achieve some sort of competence. When questioned about the efficacy of medication in improving Michael's ambivalence, Dr. Jiminez stated:

> Q. If I understand what you just told me, Dr. Jiminez, is that his ambivalence is what frightens you, that if he were less ambivalent that he might be more cooperative with the court personnel that are trying to save his life?
>
> A. That's true.
>
> Q. Is there medication that you're aware of that can eliminate ambivalence in personality?
>
> A. No. It's the extent of the ambivalence that we are concerned about. And that is part of the illness in schizophrenia so I though that maybe if he could become more stabilized that maybe there will be less ambivalence on his part.
>
> Q. How are we to stabilize him when there are no medications that eliminate ambivalence?
>
> A. Well, that's the problem.
>
> Q. You have medication that you would suggest issuing, offering and having him ingest to eliminate ambivalence?
>
> A. I really don't know that I would be able to eliminate it because it because--but you could probably try him on a bigger medication and give it to him consistently and then see if there would be a change or there would be some improvement. He had improved before. (Tr. 4/88 hearing p. 36-37, App 74-75 emphasis added)

Dr. Cox's personal observations also confirm that the outcome of medication is uncertain.

> Q. Doctor, you've also, I believe, seen him when he's undergone this forced treatment, have you not?
>
> A. Yes, sir.
>
> Q. And even after the forced treatment and massive doses of Haldol and he's still sometimes floridly psychotic?
>
> A. He gets better. In my mind I think I settled the issue, in fact, I know I settled the issue. He does respond to medication when he's given it and he gets better. How good he gets probably does leave something to be desired but he gets better.
>
> Q. Better is a relative term, isn't it?
>
> A. Yes.
>
> Q. I think that's what's troubling me a little bit. Is there any way to qualify that?
>
> A. I don't think I've seen Michael, even on medication, be completely coherent, well-integrated, rational. I've always felt in him there's areas of psychotic thinking there.

Q. Even on his best days?

A. Yes, sir, even when I see him on his best days.

Q. With the massive doses of medication?

A. Yes, sir (Tr. 4/88 hearing p. 63-64 App. 82-83)

Dr. Este also had doubts about medication.

Q. What treatment course do you recommend to make Mr. Perry competent and sane?

A. I don't feel prepared to recommend a course of treatment.

Q. Well, hypothesize for me. Would Haldol help?

A. Possibly. I'm not certain.

Q. Prolixin help?

A. It could help in some ways.

Q. Hypothesize. Any other medications could help?

A. There are others which could help.

Q. Like what?

A. A variety of neuroleptic antipsychotic drugs....

Q. And what would those neuroleptic psychotropic drugs do that would make him sane and competent? How do they work?

A. I don't know that they would make him sane and competent.

(Tr. 4/88 hearing p. 152-153 App 99-100). Emphasis added.

When Dr. Cox examined Michael prior to the September, 1988 hearing, Michael had been given an injection of Haldol (Tr. 9/88 p. 31 App. 123).[12] Four days later his condition was:

> A. (By Dr. Cox) Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me he had been having hallucinations, voices, as he described it....His thought processes were disorganized. He indicated to me that he was still hallucinating. My conclusion was that he was getting worse, even on the medication. (Tr. 9/88 p. 32 App. 124). Emphasis added.

Similarly, the medical records from Louisiana State Penitentiary show that Michael has been repeatedly medicated. Yet he continues to decompensate into florid psychosis. For example,

[12]This injection was given after the Louisiana Supreme Court stayed forcible medication of Michael.



Michael was medicated every day from November 30, 1987 to January 11, 1988 (App. 150). Yet the medical records (App. 151-154) describe his condition during that time as follows:

| | |
|---|---|
| 11/30/87 - | disoriented, hallucinating, hyperactive, agitated, yelling, hallucinating. |
| 12/1/87 - | remains delusional, medication increased |
| 12/2/87 - | increased medication, delusion of being haunted, mafia pouring water on him |
| 12/3/87 - | medicated, delusional, flight of ideas |
| 12/4/87 - | delusional, he's "God" |
| 12/5/87 - | threatening to kill with thunderbolt, confused, is "God" |
| 12/10/87 - | delusions remain |
| 12/23/87 - | continues to assert he is "God" |
| 12/31/87 - | complains devil stabbing him with a fork, psychotic, schizoaffective, disoriented, delusional, not oriented, incoherent. |
| 1/1/88 - | decompensated, delusional, confused, completely disoriented. |
| 1/2/88 - | still not well oriented |
| 1/4/88 - | still on medication, says he's in the hospital because of burning paper, poor judgment |
| 1/5/88 - | is "God", silly, loose associations |
| 1/6/88 - | increasing medication, elevated mood, no change |

Under these circumstances, medicating Michael to achieve competence is nothing more than an experiment.

And what of Michael in the meantime? He has already demonstrated a history of side effects from psychotropic drugs. Dr. Jiminez described Michael as having a very poor tolerance for medication. The recognized side effects of psychotropic drugs include drooling, unsteady gait, Parkinsonian-type symptoms, tremors, restlessness, and convulsive muscle movements. Mental and emotional effects include a feeling of deadness inside, agitation, panic, inability to remember, reason and function." (Davis v. Hubbard 506 F. Supp. 915, 928 (N.D. Ohio, 1980)): Dr. Cox described it "kinda like being in a straight jacket". Dr. Cox testified that these effects are permanent and are the result of

organic brain damage caused by the drugs.

Thus what the Trial Court has ordered is that, despite all of this history and testimony, the Department of Corrections is to manipulate the frequency and intensity of the dosage over an indefinite period of time to try to achieve "competency" that will pass constitutional muster. What guidelines are placed on this manipulation, on the dosage, the frequency, or combination of drugs? How long will this last? Who or when can someone say this isn't going to work?

In the context of civilly committed mental patients, courts have found a variety of rights that are violated by forcible medication. Cases e.g., Rennie v. Klein 653 F. 2d 836, 844-5 (3rd Cir., 1981) and Davis v. Hubbard 506 F. Supp 815 (N. D. Ohio, 1980) recognize that psychotropic drugs affect the patient's thinking processes and ability to communicate. The procedure for administering these drugs, such as by forcible injection, implicates the traditional right to be free from bodily contact. The decision to take such drugs is the kind of decision which calls into play a person's constitutional right to make intimate decisions which fundamentally affect his interests.

The source of these rights is the First Amendment freedom of speech and expression, the Due Process right to be free from unwarranted governmental intervention, the liberty interests of the Fourteenth Amendment or the penumbral rights of privacy. The specific source of these rights has caused little concern for Courts; the right to be free from such medication is treated as so basic as to be beyond dispute:

> But this Court need not rest the protection of a person's interest in being free to use his mind as he so desires on the First Amendment. It is enough to observe that "the power to control men's minds" is "wholly inconsistent" not only with the "philosophy of the first amendment but with virtually any concept of liberty". (Davis, supra at 933)

The fact that Michael has been convicted does not extinguish these rights. In Bell v. Wolfish 441 U.S. 520, 545, 90 S. Ct. 1861, 1877, 60 L. ed 2d 1 (1979); this Court stated:

We have held that convicted prisoners do not forfeit all



> constitutional protections by reason of their conviction and confinement in prison... So for example our cases have held that sentenced prisoners enjoy freedom of speech and religion under the 1st and 14th amendment ...that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the 14th Amendment and that they may claim the protection of the due process clause to prevent additional deprivation of life, liberty or property without due process of law."

And in Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980) at page 1264:

> A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

When faced with the question of forcible treatment of a convicted prisoner, Courts have again looked to the First and Fourteenth Amendments as well as the Eighth Amendment. In Bee v. Greaves 744 F. 2d 1387 (10th Cir. 1984) the court concluded that these same rights are implicated when a pretrial detainee is medicated. In addition the Court in Bee stated at page 1393:

> The [United States Supreme] Court recently suggested yet another possible basis for a liberty interest in the instant case. In Youngberg v. Romeo 457 U.S. 307, 102 S. Ct. 2452, 73 L. ed 2d 28 (1982) the Court reaffirmed that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."... The Court stated that this interest survives criminal conviction and incarceration.... If incarcerated individuals retain a liberty interest in freedom from bodily restraints of the kind in Romeo then a fortiori they have a liberty interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs.

In Large v. Superior Court 714 P. 2d 399 (Ariz., 1986), the Court found that the substantive Due Process Clause of the state constitution limited the use of forcible medication on a convicted prisoner. Louisiana too guarantees a right to due process (Article 1 Section 2), but it also guarantees a right to humane treatment (Article I Section 20), individual dignity (Article 1 Section 3), personal privacy (Article 1 Section 5), and expression (Article 1 Section 7).

In ordering Michael forcibly medicated, the Court did not separately analyze each of these rights. Rather the Court

concluded that, whatever Michael's interests may be, they are outweighed by the state's interest in carrying out his sentence (Tr. 10/88 p. 43 App. 56). This is wrong. Where has the State of Louisiana expressed this overriding interest? The Legislature has certainly not done so. The Legislature's expression is in La. R.S. 15:830 and the Code of Criminal Procedure Articles on incompetence, all of which mandate civil commitment, not execution. The Legislature's policy on medication is La. R.S. 28:171 and 15:830.1, which place limits on this use and do not authorize what the Court has done here.

Nor have Louisiana Courts not expressed such an interest. Allen and Perry, supra, say Louisiana does not execute the insane.

Even if such an interest had been expressed, the Trial Court has omitted a very important word - the word "legitimate". The State may want to execute Michael but it is not just any such desire that will override Michael's constitutional rights. The balancing state interest must be a legitimate interest. The state has no legitimate interest in executing an insane person. Executions of the insane are unconstitutional and the state has no legitimate interest in attempting to carry out an unconstitutional sentence. Such sentence is invalid and prohibited by the Eighth Amendment. Using a means, particularly one as drastic as forced psychotropic medication, to achieve something which is, from the outset, an illegitimate end does not justify the devastation that the Court has done to Michael's rights. Louisiana has imposed the death penalty on Michael but no statute authorizes the infliction of these mental and psychological torments to try and achieve that end. No one is pretending that this medication is for Michael's treatment or that the doctors are being asked to exercise professional medical judgment. The instruction from the Court is to medicate to achieve one end only - competence for execution.



Nor is there any legitimate interest that outweighs these rights and permits what the Trial Court has done here.[13] In Bee supra and Large, supra the Court analyzed all of the alleged state interests put forth by the government and uniformly rejected them as sufficient to permit the type of forced medication ordered here. With regard to using drugs to establish competence, the Court stated at p. 1395:

> With their potentially dangerous side effects, such drugs may not be administered lightly. Generally speaking, a decision to administer antipsychotics should be based on the legitimate treatment needs of the individual, in accordance with accepted medical practice. A state interest unrelated to the well being of the individual or those around him simply has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned.

Large states, as bluntly and succinctly as any case, the relationship between constitutional rights, state interests, forced medication, and the convicted prisoner:

> The freedom of convicted and sentenced criminals is subordinated to the state's interest in enforcing the sentence. The state may do anything and everything reasonably necessary to the safe confinement of the prisoner. It may shackle, isolate or otherwise restrain him physically if necessary to prevent escape or injury. But its power with regard to such physical restraints is not unlimited. The same principle applies to the type

[13]The Court has actually undermined a legitimate state interest - namely that of preserving the ethical integrity of the medical community. Guardianship of Roe, supra. The State, as the licensing agency for physicians and psychologists, has an interest in encouraging these professionals to comply with ethical standards. Yet by ordering physicians to medicate Michael for execution, the Court has asked these professionals to act contrary to their ethical guidelines. The American Medical Association has established a standard prohibiting doctors from participating in an execution ("Judicial Council of the American Medical Association" Report A (1980)). The American Psychiatric Association has done the same ("Principles of Medical Ethics Applicable to Psychiatry" Section 1(4)). This dilemma is also discussed in "Medical Ethics and Competency to be Executed" 96 Yale L. J. 167 (1986)

Dr. Vincent and Dr. Cox clearly see an ethical dilemma in medicating Michael. As Dr. Cox stated:

> Q. Could you be the treating physician for Mr. Perry?
>
> A. No, sir.
>
> Q. Why not?
>
> A. Because it is incompatible with my sense of ethics to treat somebody so they can get better and be executed.

of chemical restraints under consideration here. The state may forcibly inject this prisoner with drugs carrying the potential for causing serious side effects in any emergency where such a procedure is necessary, just as it may shoot him if justified in an emergency. But no such emergency can be claimed here, for this prisoner has been medicated against his will for months. The state may similarly administer psychotropic drugs with their known and unknown dangerous properties to this prisoner for purposes of treatment if it is authorized by proper procedural regulations, and if the drug administration is approved by qualified medical judgment and is prescribed for valid medical reasons. Valid reasons include cure or control of the diagnosed mental disorder; they do not include chemicals to keep prisoners docile and manageable regardless of potential serious physical and emotional consequences. The legislature has the authority and power to provide for punishment and incarceration of criminals. It does not have and cannot give to the Department of Corrections the power to immobilize and warehouse prisoners by using chemicals with known adverse consequences, only to release them - possibly severely impaired - at the end of their sentences. Such an Orwellian result is not permitted by our state constitution.

Large, supra at 409

"Orwellian" is the perfect word to describe Michael's plight. The Trial Court's order of October, 1988 hearing was not an order to treat Michael pursuant to any medical recommendation or exercise of a physician's professional judgment. The order was to medicate him to try to create and maintain competence. [14] The Department's medical staff was not directed to use its professional judgment to treat him as he would be treated were he a private patient or even an inmate not facing a death sentence.

The Department is simply to medicate Michael often enough, regularly enough, and strongly enough to try to get him competent to be executed. The order does not permit abatement of medication even if Michael develops side effects which may lead the physician, in the exercise of his professional judgment, to change or even terminate the medication. It is obvious that, under these circumstances, the medication ordered for Michael is not treatment; it is part of his punishment. To subject Michael to medical

[14]App. 62 "It is further ordered that defendant's competency is achieved through the use of antitropic or antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and corrections is further ordered to maintain the defendant on the above medication as to be prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection."



experimentation to try to achieve some indeterminable level of synthetic competence not to cure him, or to treat him, or to allow to stand trial - but rather to get around the Eighth Amendment and execute him - is a horror which this Court should not permit.

Indeed what the Trial Court has done is to turn Ford and the Eighth Amendment against Michael. If Michael were not insane, the State may be able to execute him but would be limited by the Eighth Amendment in the mode of that execution. The State could not conduct medical experiments or inflict arbitrary and gratuitous suffering on him. But because Michael is insane, the State is now able to inject him with unlimited dosages of drugs, for an unlimited time. The State is not required by the Court's order to consider the judgment of professionals or it evaluate the side effects. No further hearings are scheduled to evaluate the results of this medication; the injections are to continue whether they work or not. For Michael, the Eighth Amendment no longer is a protection against cruel and unusual punishments; it has become a vehicle by which new punishments, not authorized by any statute, become permissible.

The State has simply gone too far in this case. The State's interest in carrying out this death sentence is not a legitimate justification for unlimited injections of drugs, the results of which are at best questionable. Nor is the State's interest sufficient justification for imposing the death sentence based on competence which is no more than a momentary "glimpse" of sanity or a mouthing of some sought-for words.

Ford and the Eighth Amendment require more than this. At the very least, the Eighth Amendment requires that the State be limited in the use of forcible medication, taking into consideration the amount of time a person can be subjected to such medication and the side effects on those drugs, all subject to periodic review by the Court.

If the medication appears to be effective, the inmate is entitled, particularly under Louisiana law, to an adversarial hearing with Due Process protections for re-evaluation of his

competency. The test of that competency must demonstrate something more than one lucid moment tucked away in months of incoherence and hallucinations.

And at some point, when the medication has proved ineffectual or the side effects serious, the State's right to carry out the execution must cease and the inmate given what he was entitled to at common law - a respite from the execution altogether.

Michael, therefore, prays that this writ be granted, that this Court reverse the Trial Court's order of unlimited, interminable druggings, and impose limits on the use of forcible medication.



II. THE PROCESS BY WHICH THE TRIAL COURT DETERMINED PETITIONER'S COMPETENCY VIOLATED DUE PROCESS IN THAT THE DECISION WAS BASED ON HEARSAY AND OPINION "EVIDENCE" SUBMITTED BY THE STATE EX PARTE TO THE JUDGE, WITHOUT CALLING THE "WITNESSES" AT ANY HEARING OR SUBJECTING TO CROSS EXAMINATION AND CONFRONTATION. AND WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD.

Ford v. Wainwright 106 S. Ct. 2595 (1986) was concerned not only with the Eighth Amendment's prohibition against executing the insane but also with the process by which competency is determined. Unlike Ford, however, the question in this case is not whether the State's statutory scheme is constitutionally defective. Rather, in this case, the Court failed to apply the State's statutory scheme and, in doing so, violated petitioner's Due Process rights.

Sometime after the April 20, 1988 hearing the Trial Court began ex parte communication with the State. Information was provided weekly to the trial court regarding Michael. This information was not made available to Counsel for Michael nor were they even made aware of the existence of the information or the communications. Counsel first became aware of the material when the State citing a "weekly report" in a brief to the Trial Court after the April, 1988 hearing.

Defense counsel filed a written motion (App. 139) objecting to the Court receiving or relying on any such communications, citing expressly Michael's right of cross-examination, confrontation, basic due process and Sixth Amendment concerns. Counsel also asked for a hearing on whether this communication should be considered.

No hearing was granted and on August 26, 1988 the Court denied the written motion and expressly stated that it relied upon and was considering these materials (Tr. 8/88 p.4-5 App. 110-111). The end result of the Court's reliance on the uncross-examined, unsworn hearsay and opinion was a "new" hearing set by the Court on September 30, 1988. No express ruling on Michael's competency has

been made from the "old" hearing. [15]

This ex parte communication includes not only communications with counsel but also isolated observations and commentary on Michael's condition by Department of Corrections personnel. These persons were never called to testify, been cross-examined or subjected to the basic rule of competency - the oath. These reports offer opinions even though the author has never been qualified as an expert and no factual foundation for the opinion was established. Additionally, some two months after the hearing when counsel learned of these communications, it was discovered that some of the correspondence was directly in obvious "question and answer" format relating to issues before the Court.

A few excerpts from these ex parte communications will show that the Trial Court erred in receiving these as evidence and that this error amounts to a denial of Due Process. One of these letters (App. 156) states that, although the author does not see Michael regularly, it is her "understanding" that he functions well when on his medication. This is obviously opinion based on hearsay and on an unknown and unknowable set of "facts."

[15]The Trial Court also erred by permitting Dr. Kay Kovac to testify at the September hearing. Dr. Kovac was called as a witness by the Court. It is not at all clear why Dr. Kovac was called. She is not a psychiatrist or psychologist; her background is in family practice medicine (Tr. 9/88 p. 9 App 113). The State had never called or mentioned her as a witness nor was she a member of the original sanity commission appointed for the April hearing.

Dr. Kovac went to see Michael in her capacity as a physician (Tr. 8/88 p. 12 App. 115) . Counsel for Michael was not present during this "talk" nor were they aware that such contact was to take place. She talked with Michael about taking his medication. She then questioned Michael about the reasons for not taking his medication and offered her opinion (in spite of her lack of credentials) about Michael's condition (Tr. 9/88 p. 13, 16, 29 App. 116,119,122). She also testified about her opinion on the relationship between Michael's condition and medication (Tr. 9/88 p. 26-27 App. 120-121) even though she admittedly has had minimal contact with Michael (Tr. 9/88 p. 10 App. 114).

This testimony was obtained in violation of Michael's patient:physician (La. R.S. 15:476) and attorney:client privilege as protected by the Sixth Amendment. Dr. Kovac enticed Michael to talk to her, not by virtue of her status as an appointed examiner and member of the sanity commission, but under the appearance that she was a treating physician. Her testimony was neither cumulative nor harmless. The Court obviously relied on this testimony in its ruling (Tr. 10/88 p. 39-40 App. 52-53).



A second repo . (App. 157) poses thre questions directly related to the issues before the court, namely Michael's condition on medication, his condition immediately after being removed from medication, and his condition after being off medication for an extended period. The answers consist of the author's impressions and opinion derived from a review of Michael's medical chart. The answers are not a factual synopsis from the chart. For example in answering the first question, the author states that "he appeared to be stabilized". Appears to whom? Based on what facts? Is this the author's personal observation, someone else's observation, or the author's paraphrase of the record? There is no indication that the author has ever personally seen the symptoms she reports, even assuming that she is qualified to be an expert on such symptoms. To the contrary, the record "apparently" states that Michael is sometimes bizarre and suicidal but the author states that she has never seen any suicidal or homicidal gesture or any documentation that Michael ever attempted to carry out any threats.

Another excerpt consists of one day's nursing notes from Michael's hospital record at Louisiana State Penitentiary (App. 160). Michael is constantly being hospitalized because he decompensates. Why pick this one day? The answer is obvious - this was an attempt to convey the impression that Michael was rational. However, the testimony from the April, 1988 hearing shows that Michael is a "moving target". His contact with reality varies on a daily (or less) basis. This was not a fair attempt to keep the Judge continually updated on Michael's condition - it is a blatant attempt to pick and choose "evidence" most beneficial to the State, outside of the ability of defense counsel to challenge the evidence and demonstrate that this is not representative of Michael's condition.

The same is true of the last exhibit (App. 162) in which the author states that she "saw [Michael] while ...on the tier to see another inmate. He appears to be in fair remission". "Fair" as compared to what? What had she seen the day before, or week before - a decompensated, insane Michael? On what facts was this opinion

based - did she interview him, do diagnostic testing, or did the author just catch a glimpse of Michael as she walked down the hall? We will never know.

The purpose of cross-examination is to explore these questions so the trier of fact can determine what weight, if any, to give to the witness' testimony based on, for example, her expertise, knowledge of Michael, any biases of the witness' part, and the facts upon which her opinion is based. Michael was denied this opportunity because of the ex parte nature of these communications. As stated in Ford:

> "[C]ross examination...is beyond any doubt the greatest legal engine ever invented for the discovery of the truth.... Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the basis for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent....The failure of the Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted."

Ford, supra at 2605.

The Court then noted (page 2605) that the reliability of the fact finding process is further called into question when the opinion is based on only a cursory examination of the inmate. In Michael's case, it cannot be said with any certainty that there was even a cursory examination - the best that can be said is that the author "saw him on the tier while going to see another inmate". That is far less that the examination accorded Ford.

The procedural defect in Michael's case is as egregious as the defect which led this Court to find Florida's procedure constitutionally inadequate. In Ford, defense counsel was not given an opportunity to present evidence and cross-examine the experts. In Michael's case, there was a hearing at which the State and defense questioned the members of the sanity commission. The



problem is that the Court's decision was not made on that evidence adduced at that hearing - the record was "supplemented" with these ex parte reports and those reports obviously influenced the Court's decision. The Court so stated. (Tr. 8/88 p. 4-5 App. 110-111).

This Court has said on at least three occasions that determinations of competence must comply with minimal due process, cross-examination and confrontation. In addition to Ford, the Court in Vitek, supra held that the transfer of an inmate for psychiatric treatment without adequate hearing and confrontation was unconstitutional. In Specht v. Patterson 386 U. S. 605, 87 S. Ct. 1209 (1967), the Court reversed where the trial judge relied on a psychiatrist report, without a hearing, in determining that defendant should be transferred to a mental hospital. The Court found that a procedure which considered hearsay evidence and denied cross-examination and confrontation violated due process.

The procedure used in Michael's case is not only contrary to these cases but is also contrary to Louisiana law. Regardless of what may be constitutionally required, Louisiana has enacted statutes which guarantee an adversarial proceeding when competence is at issue. Notice, hearing, confrontation and cross-examination are expressly made a part of the Code of Criminal Procedure Articles on sanity commissions (C. Cr. P. 647), and the statute on commitment of insane inmates (La. R.S. 15:830) and the statute on medication of inmates (La. R.S. 15:830.1). As stated in Justice White's and Justice O'Connor's separate opinion at p. 2611-2613:

> As we explained in Hewitt v. Helms 459 U.S. 460, 103 S. Ct. 864, 74 L. ed 2d 675 (1983), '[l]iberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself and the laws of the states."...With Justice Rehnquist I agree that the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency.... The relevant provision of the Florida code, however, provides that the Governor shall have the prisoner committed to a "Department of Corrections mental health treatment facility" if the prisoner "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him".... Our cases leave no doubt that where a statute indicates with "language of an unmistakable mandatory character" that state conduct injurious to an individual will not occur "absent specified substantive predicates", the statutes create an expectation protected by the Due Process Clause....

> I conclude therefore that Florida law has created a protected expectation that no execution will be carried out while the prisoner lacks the "mental capacity to understand the nature of the death penalty and why it was imposed on him."

Like Florida, Louisiana has created an "expectation" that execution will not be carried out while the defendant is insane. That "expectation" has a long history in Louisiana law (State v. Allen, 15 So. 2d 870 (La. 1943) and cases cited therein). Louisiana has also created a process by which competency is to be evaluated, a process that purports to provide basic Due Process protections.

That process was not applied here. What is at issue is that the integrity of the factfinding process broke down. The procedure used by the Trial Court is not allowed by Louisiana law or by constitutional guidelines. These procedural and constitutional errors warrant the reversal of the Trial Court's decision. Counsel is literally litigating for Michael's life and it is grossly unfair to ask counsel and demand that Michael give up the right to a fair review that observes and respects normal statutory and procedural course. This error alone mandates reversal of this entire proceeding.



## CONCLUSION

Michael Owen Perry is insane. Louisiana has said that it will not execute the insane. Standards of human decency embodied in the Eighth Amendment prohibit his execution. Yet Michael is being condemned not only to the death penalty but to the horror of forced, unbridled administration of drugs to try to circumvent these prohibitions. The process leading to the decision to drugged Michael failed to comply with the Due Process protections enacted by Louisiana and the decision is based on evidence obtained unconstitutionally. Michael prays that this Court grant this writ, reverse the ruling below, and prohibit the State of Louisiana from using forcible medication in an effort to establish competency.

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IN THE SUPREME COURT OF THE UNITED STATES



NO. 89-5120

MICHAEL OWEN PERRY,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

# ORIGINAL BRIEF ON BEHALF OF RESPONDENT, THE STATE OF LOUISIANA, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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## ISSUES PRESENTED

I. May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

II. Assuming that: (1) competency to be executed may be medically achieved and maintained without the prisoner's consent, and (2) the condemned inmate has a constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to treatment?

## SUMMARY OF THE ARGUMENT

The State of Louisiana argues that this Honorable Court in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986) implicitly recognized that competency to be executed could be achieved and maintained through the administration of antipsychotic medication. While the Eighth Amendment under Ford prohibits the execution of the insane, post-conviction insanity was defined [as a condemned inmate who was unaware of his impending execution and the reason for it] by Justice Powell in his concurring opinion. Competency is the sole inquiry; how that competency is achieved and maintained is not a factor. Medication can help assure the inmate that he will be aware of his impending death and the reason for it. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

The administration of the antipsychotic drug Haldol to the petitioner does not violate his rights under the Eighth Amendment. Haldol is a medically recognized treatment for anyone suffering from schizoaffective disorder. The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency.

This Honorable Court in Penry v. Lynaugh, __ U.S. __, 109 S.Ct. 2934, ____ L.Ed.2d ____ (1989), held that the Eighth Amendment does not prohibit per se the execution of an inmate who is mentally retarded. A fortiori, a death row inmate who is mentally ill and whose competency for execution is achieved and maintained by medication should have no greater right than a mentally retarded inmate, whose mental state cannot be improved through medication. The State of Louisiana argues that



once a mentally ill inmate has been sentenced to death, his mental illness is irrelevant unless it affects the de minimus competency standard as outlined in Ford.

A pre-trial detainee may be subjected to trial despite the fact that his competency is achieved and maintained by medication. Louisiana has recognized this principle in its jurisprudence since 1969. Because a condemned inmate is entitled to diminished constitutional protections, he should not be afforded greater rights than a presumptively innocent individual who faces trial. Once a condemned inmate is declared competent for execution, his medication should be a factor only if it impinges upon the de minimus competency requirement.

The State of Louisiana does not concede that Michael Perry has a liberty interest to be free from the forcible administration of an antipsychotic drug that is designed to achieve and maintain competency for execution. However, if such a "right" exists, the State argues the liberty interest was extinguished when a validly imposed sentence of death was rendered by the jury. In the alternative, should the Court hold that Perry retained his liberty interest despite his conviction, the State of Louisiana argues that his interest must give way to the State's overriding and legitimate interest in carrying out the sentence retribution.

Despite the inmate's wishes, the State of Louisiana, under its parens patrie and police powers, has an affirmative duty to provide all incarcerated inmates with adequate psychiatric care, including the administration of antipsychotic medication. Deliberate indifference to the inmate's mental health violates his constitutional guarantees under the Eighth Amendment.

Both federal and state statutes subsume the necessity of medical treatment with a judicial finding of incompetency to proceed to trial. A death row inmate who has raised the shield of incompetency to proceed to execution has implicitly authorized the State to medicate him, if necessary, to achieve competency.

The petitioner has the burden to prove a national consensus against forcibly medicating death row inmates. He has failed to do so. Furthermore, the petitioner's counsel has not established a conflict in the district courts, which allow forcible medication of civil committees and pre-trial detainees, provided professional judgment is exercised, and judicial review is provided.

The trial court's determination of competency to be executed (i.e., competent only when medicated) was made in accord with Ford v. Wainwright. The procedural due process which governs the inquiry into competency to be executed requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker. Inmate Perry enjoyed procedures far in excess of de minimus constitutional standards. Further, the trial court's conduct of the proceedings was eminently fair and conscious of the significance of the proceeding.

The trial court ordered treatment of the condemned inmate premised upon the findings of competence only when maintained on medication. The treatment order was made in accord with this Honorable Court's decision in Vitek v. Jones, which implicitly recognized that nonconsensual treatment may occur as a result of a determination that treatment is needed. Alternatively, if due process requires an additional decisionmaking process prior to nonconsensual treatment, then such decision is left to the professional judgment of medical personnel at the custodial institution.

## INTRODUCTION

In Ford v. Wainwright 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986), this Honorable Court held that a state could not impose the death penalty upon a prisoner who had become insane subsequent to his conviction. To do so, the majority of this Court concluded, would be cruel and unusual punishment under the Eighth Amendment. Writing for the plurality, Justice Marshall stated that neutral expert opinions should allow a court to focus on "the prisoner's ability to comprehend the nature of the penalty" and that the condemned inmate's mental illness must prevent him from "comprehending the reasons for the penalty or its implications." Ford 106 S.Ct. at 2606. Justice Powell, concurring in part and concurring in judgment, was the only justice to directly address the standard by which post-conviction competency should be measured. That standard - whether the condemned inmate is aware of his impending execution and the reason for it - has subsequently been cited with approval by Justices Brennan and Marshall, in Johnson v. Cabana, ____ U.S. _____, 107 S.Ct. 2207, ____ L.Ed.2d _____, (1987) (Brennan, Marshall, J.J., dissenting) and most recently, in Penry v. Lynaugh, ____ U.S. _____, 109 S.Ct. 2934 (1989), ___ L.Ed.2d _____, (1989). In Penry this court held, in part, that the Eighth Amendment did not prohibit the execution of a



mentally retarded person with the reasoning ability of a 6 1/2-year-old child. Ford, furthermore, was cited in Penry for the premise that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." Penry, 45 Cr.L. at 3196 (1989), citing from Ford, 477 U.S. at 422 (1986) (Powell, J., concurring in part and concurring in judgment.)

New questions which necessarily evolved from the Ford and Penry decisions are now before this Honorable Court. Is a death row inmate's execution stayed simply because his competency is achieved and maintained by medication? May a condemned inmate refuse medication that is designed to achieve and maintain competency as a means to thwart the imposition of a legally imposed death sentence? Does a death row inmate have a constitutional right to choose insanity over the electric chair? The State of Louisiana respectfully argues that the competency constitutionally mandated by Ford may be achieved and maintained, if necessary, through nonconsensual, medically supervised treatment, including the administration of antipsychotic medication. The authorities discussed below indicate that a death row inmate simply cannot be allowed to choose insanity as a means of granting his own personal stay of execution.

Petitioner, death row inmate Michael Owen Perry, is before this Court seeking writ of certiorari primarily on the grounds that the nonconsensual, medically supervised administration of the antipsychotic drug Haldol to meet the Ford standard violates his rights under the Eighth and Fourteenth Amendments. Before addressing these issues in detail, the State of Louisiana first would like to alert this Court to the many inaccuracies contained in the petitioner's brief. First, there is no evidence in the record that Michael Owen Perry has ever been medicated against his will.[1] Any medication administered, has been only upon his physician's

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1. Counsel for the petitioner can point to no record reference that shows that Michael Owen Perry has been forcibly administered either oral or intramuscular medication. The State of Louisiana, thereby, questions whether Perry even has standing upon which this issue may be addressed.

order and directive, and administered only at regulated intervals.[2] While on medication, Perry's mental condition stabilizes so that he is not a danger to himself or others. The medication eliminates Perry's delusions and hallucinations. At times, Perry himself has requested the medication. An additional benefit is that Perry's competency for execution is also maintained. It is this latter benefit that troubles Perry.

Relying on Louisiana's jurisprudence that adopted the Ford standard as the de minimus test for competency to be executed, the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, ruled on October 21, 1988 that Michael Owen Perry is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment." (R. pp. 0784-85.) The district court's holding was bifurcated. While Perry is competent to be executed, that competency is achieved and maintained only through the administration of Haldol. (R. p. 0005). This implies that Perry is not competent for execution in his unmedicated state. There is no dispute that Perry suffers from schizoaffective disorder; all doctors who have examined him have made the same diagnosis. The mental illness, however, can be controlled through the use of antipsychotic medication, much like diabetes is controlled by insulin injections. The structure of this brief will be first to establish the arguments underlying the State's position that medically induced competency is constitutionally acceptable under Ford. Next, the State will argue that a condemned inmate must be medicated without his consent if such medication is necessary to carry out a legally imposed death sentence. Finally, the State will address the procedural due process protections that may be required for the condemned inmate.

The State of Louisiana respectfully contends the sole focus should be on competency, regardless of how it is achieved or maintained, and regardless of whether the condemned inmate consents to the necessary medical treatment or not. Otherwise,

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2. Medication is administered routinely (R. p. 0753-54) that is, one monthly intra-muscular injection and a daily oral supplement three times per day. Doctors also testified that Perry's condition only improves with medication. (R. p. 0557). Counsel for the petitioner has stated that Perry decompensates even while on "massive" dosages of antipsychotic medication. This statement is taken out of context. In fact, Dr. Cox testified that if Perry was still hallucinating despite the medication, one solution was to increase the dosage. (R. p. 0737-38). Perry must be on a consistent medical treatment plan for three months just to stabilize his mental state. (R. p. 0742-44).



a death row inmate has the power to thwart the State's attempt in carrying out a validly imposed death sentence. Most importantly, the State of Louisiana beseeches this Honorable Court to deny the petitioner's request for writ of certiorari. As stated above, there is no evidence in the record that Perry has ever been forcibly medicated. Furthermore, Perry has pointed to no conflict in the district courts concerning the relevant legal issues.

ISSUE I.

May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

ARGUMENT

1. Ford v. Wainwright implicitly recognizes that medically aided competency achieved by the administration of antipsychotic medication is acceptable for purposes of competency to be executed.

The State of Louisiana contends that medically aided competency is sufficient competency for execution under the Eighth Amendment. The rationale behind the competency standard as announced by Justice Powell, is to ensure that the two major purposes of the death penalty - retribution and deterrence - are served. Synthetic competency serves both purposes. First, the antipsychotic medication assures the mentally ill condemned inmate that he has sufficient mental capacity to understand that he is being executed for the crimes he committed. Thus, retribution is served. Second, the medication achieves and maintains competency so that the execution may lawfully take place. Therefore, the deterrent factor for society as a whole is served.

The State's position that synthetic competency is sufficient under Ford is further supported by the reasons for requiring that a minimum competency level be met. A stay of execution under Ford is not triggered unless the condemned inmate is so mentally deficient that he is unaware of his impending execution and cannot comprehend the reason for it. The medication itself has no bearing on the reasons competency is required. Either the inmate is competent or he is not. If anything, medication actually enhances an inmate's level of competency. Therefore, the inmate's competency, whether or not medication is involved, should be the sole inquiry.

The resolution of this issue may very well affect the State of Louisiana's right to demand retribution from this petitioner. Expert testimony at Perry's sanity hearing was unanimous that Perry, medicated or not, presently knew of his impending death and the reason for it. Dr. Cox expressed the opinion, however, that if Perry is allowed to remain off



antipsychotic drugs for as little time as three weeks, Perry may decompensate to the point of being incompetent for execution. (See Dr. Cox's report, dated April 20, 1988). Therefore, under the Ford standard, the State of Louisiana's right to seek retribution against Perry may very well be hinged upon its right to forcibly medicate him, if necessary. A death row inmate should not be allowed to escape execution under Ford by refusing medication necessary to achieve or maintain competency.[3]

If medication is a factor in the competency equation than this presupposes that a mentally ill capital offender has greater constitutional rights than a capital offender who is not mentally ill. Furthermore, medicine administered to a condemned prisoner to prevent delusions and hallucinations also can only enhance that inmate's chance "to prepare mentally and spiritually, for their death" as Justice Powell said in Ford, citing Coke. Ford, 105 S.Ct. at 2608. The Eighth Amendment assures an inmate that he will be given time to prepare for his death, and that he will know the reason why his life is being extinguished. Medication satisfies the Eighth Amendment mandate that these assurances are met. If Perry is allowed to avoid his death sentence by refusing to submit to medical treatment, the result would be that a death sentence would be decided on the fortuity of whether the condemned inmate voluntarily chose to be medicated or not. Mentally ill death row inmates would thereby have greater rights than those who are not mentally ill.

The State's position that a mentally ill death row inmate has no greater rights than any other death row inmate is further supported by the Court's opinion in Murray v. Giarratano, ___ U.S. _____, 109 S.Ct. 2765, ___ L.Ed.2d _____ (1989), 45 Cr. L. 3155. Giarratano held that in a post-conviction proceeding, a state could validly deny under the Eighth Amendment and the Due Process Clause appointed counsel for an indigent offender, whether or not the offender was sentenced to death row. In other words, this Court recognized that a capital offender had no greater right to counsel during post-conviction relief, than did a non-capital offender. Likewise, the State of Louisiana posits that the

3. The record clearly supports a strategy between Perry and his counsel to refuse medication, and thereby induce insanity as a loophole to execution. (R. pp. 0753-54; 0717-18). Perry himself said: "...[I]t's just -- it's very simple to understand, take my pills and die, don't take my pills and live ... so I'm not going to take my pills." (R. p. 0717-18).

status of mentally ill should not carry with it greater constitutional protections. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

While Ford did not directly address the issue of synthetic competency, the words of Justice Powell intimate that medication to achieve sanity is presumed to follow a stay of execution:

> "It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless OR UNTIL he recovers his sanity cannot be deprived without a 'fair hearing'." Ford 106 S.Ct. at 2609 (Powell, J., concurring). (Emphasis provided).

Justice Powell's footnote in Ford even more clearly establishes that competency achieved through medication would satisfy the Eighth Amendment. As Justice Powell so aptly stated in his opinion, the question is not WHETHER Perry will be executed, but WHEN. Justice Powell continued in a footnote:

> "It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that IF PETITIONER IS CURED OF HIS DISEASE, THE STATE IS FREE TO EXECUTE HIM." Ford, 106 S.Ct. at 2610 (Powell, J., concurring) (footnote No. 5). (Emphasis provided).

These words of Justice Powell indicate that once incompetency is judicially established, the condemned inmate should then be treated in an attempt to restore sanity. Once sanity is restored, the inmate is again eligible for execution. This is precisely the procedure recognized at common law in Louisiana since 1896. (See State's Brief to the Louisiana Supreme Court, Appendix A, p. 96). Treatment of a mentally ill prisoner necessarily implicates medication; otherwise, in most instances, no cure or remission of the illness is possible. Therefore, the State of Louisiana respectfully submits that competency, whether or not medication is involved, is all that Ford requires.

(a) The administration of antipyschotic medication to a mentally ill prisoner is not cruel and unusual punishment.

The petitioner's counsel has equated Perry's medication as punishment itself under the Eighth Amendment, which is an incorrect conclusion. The Eighth Amendment only



prohibits cruel and unusual PUNISHMENT. The punishment in this case is death by electrocution, a validly imposed sentence under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment. Haldol is a medically recognized treatment for anyone afflicted with Perry's mental illness. Haldol is not being administered to him because he premeditated the execution of five family members including his parents and a 2-year-old nephew. Haldol is a medicine prescribed for many individuals who suffer from mental illnesses or disease. Therefore, opposing counsel is misdirecting the Court's attention when they attempt to argue that the medication administered to Perry is cruel and unusual punishment under the Eighth Amendment. At best, the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out.

The State can best illustrate its position that Haldol itself is not punishment by pointing to an outstanding All-American basketball player, Chris Jackson of Louisiana State University. Jackson, who takes Haldol on a daily basis for a neurochemical disorder called Tourette's syndrome, needs the medication to avoid uncontrollable twitching and spasmodic body movements. (See Appendix A, p. 162). This example further illustrates as absurd any of the petitioner's arguments that equate the administration of Haldol to Perry as the equivalent of a frontal lobotomy.

The sincerity of opposing counsel's concern for Perry's well-being is also suspect, at best. Petitioner's counsel, Keith Nordyke, had ordered Perry abruptly removed from his medicine just prior to an upcoming courtroom appearance, without any consideration whatsoever for the consequences that are suffered with sudden withdrawal from antipsychotic medication. Nordyke's "Do-Gooder" motion was in actuality an attempt to induce a calculated insanity as a means to avoid a validly imposed death sentence. Nordyke's decision was aimed at defeating the death penalty, even if that meant Perry may become insane. Ironically enough, Nordyke himself is attempting to sentence Perry to a life of incarcerated insanity, which is certainly a cruel and unusual punishment under the Eighth Amendment. Now he appears before this Honorable Court to argue that the administration of medication, to which all doctors have testified alleviates the symptoms of Perry's illness while at the same time achieves and maintains competency, is cruel and unusual punishment.

In fact, the medicine is in both Perry's and the State's best interests. Dr. Cox, one of Perry's treating

psychiatrists, has recommended that Perry be treated with Haldol. The trial court during Perry's competency hearing questioned Dr. Cox concerning the medication, and asked whether any less intrusive medicine could stabilize and improve Perry's mental state. Dr. Cox responded: "No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs..." (R. at p. 0745). Professional medical opinion, thereby, supports the administering of Haldol to Perry as the means best designed to serve his medical needs. At the same time, Haldol serves the State's purpose of achieving and maintaining competency for execution. There is also no alternative, less intrusive, medication that will satisfy the same needs.

Opposing counsel has also strenuously objected to the administration of antipsychotic drugs because of side affects that may occur. Yet nothing in the record supports the fact that Perry now suffers from any side effects. Dr. Cox stated he has never seen Perry suffer from any side effects (R., p. 0746) and that he does not now suffer from tardive dyskinesia. (R., p. 0574-75). Dr. Cox also predicted that even if Perry was continuously medicated with antipsychotic medication for the next five years he had only about a one in four, or one in five, chance of developing tardive dyskinesia, the most severe possible debilitating side effect. (R., p. 0574-75). There is also evidence in the record that Perry may pretend to suffer from some of the lesser side effects, such as drooling and impairment of his movement. (R. pp. 0527-9). The benefits of Haldol clearly outweigh any minor side effects. At the same time, many side effects themselves can be controlled by medication. Ironically enough, while Nordyke has criticized the State of Louisiana for allegedly administering Haldol to Perry because of these possible side effects, his own order to abruptly stop all medication subjected Perry to identical side effects. Sudden withdrawal from Haldol may cause a patient to suffer dyskinetic movements indistinguishable from tardive dyskinesia. (See Appendix A, p. 163).

(b) Ford v. Wainwright and Penry v. Lynaugh support the death penalty for mentally ill inmates whose competency is achieved and maintained through medication.

Decisions of this Court support the argument that a death row inmate's mental state - be it mental illness or mental retardation - is not itself dispositive of whether or not the inmate is eligible for execution. Ford illustrates the argument that mental illness per se is not a bar to imposing



the death penalty. If this were true, there would be no need for a de minimus competency standard. A physician's diagnosis alone that the inmate was suffering from a mental illness would automatically commute a death sentence to life imprisonment. Also implicit in Ford is the proposition that a mentally ill condemned prisoner whose competency is achieved and maintained by medicine may be subjected to the death penalty. The only requirement is that the inmate be aware of his impending execution and the reason for it.

This Court also expressly held in Penry that a mentally retarded prisoner may be subjected to the death penalty. Mental retardation, unlike mental illness, is a permanent condition unaffected by medication. A fortiori, a mentally ill death row inmate whose competency is achieved by medication should have no greater rights than a mentally retarded death row inmate, whose mental state is unalterable. As Penry established, a jury should consider mental retardation and the defendant's history of child abuse as mitigating evidence in the sentencing phase. In Perry's case the jury considered and rejected his history of mental illness as a reason to not impose the death penalty. The State's position is that, once a death sentence is validly imposed, evidence of mental illness or mental retardation is irrelevant under Ford unless it affects the de minimus competency standard. The only focus should be whether the Ford competency test is achieved. The Eighth Amendment does not otherwise prohibit execution of a competent prisoner regardless of the inmate's mental status.

(c) Synthetic competency has been recognized as sufficient competency under which a presumptively innocent individual stands trial. Therefore, a convicted murderer whose competency is achieved and maintained through medication should have no greater right

Louisiana's jurisprudence had recognized that synthetic competency is sufficient competency upon which a defendant may stand trial. See State v. Hampton, 218 So.2d 311 (La. 1969) and State v. Lawrence, 368 So. 2d 699 (La. 1979). Decisions of the Louisiana Supreme Court and the First Circuit Court of Appeals have also approved compelled medication as a condition precedent to release of insanity acquittees. See State v. Collins, 381 So. 2d 449 (La. 1980), and State v. Boulmay, 498 So. 2d 213 (La. App. 1 Cir. 1986). Historically, the Louisiana courts look to the individual's present condition only. How that person's competency is maintained or achieved has no bearing upon whether that person is competent for trial, or eligible for discharge from a commitment. Because Perry's

writ application to the Louisiana Supreme Court was denied, the State of Louisiana can only assume that this analysis applies with equal force, regardless of whether the question is competency for trial, competency for discharge or competency for execution. The State believes that Perry and his counsel would become the most outspoken advocates of the Haldol medication if it meant that Perry would be freed from prison; and certainly opposing counsel would be alleging constitutional violations if Perry had been denied medical treatment prior to trial. Opposing counsel's true objection is the death penalty itself, not the Haldol treatment or the synthetic competency.

Two members of this Court suggested in Vincent v. Louisiana, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939, reh. den. (1985) (J J. Brennan, Marshall dissenting) that a mentally ill defendant may have been denied a fair and impartial trial because he was denied the antipsychotic drug Thorazine. Justice Brennan wrote: "There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated." Vincent, 105 S.Ct. at 930. This passage certainly implies that synthetic competency to stand trial is constitutional, indeed even required. If synthetic competency is permissible, and, ir view of the Vincent dissent, constitutionally mandated prior to conviction, then it must also be acceptable during a post-conviction proceeding as well.

The State of Louisiana further contends that competency is not contingent upon whether the individual is medicated or not. Competency is competency, regardless of medical treatment. The Fifth Circuit of the U.S. Court of Appeals in U.S. v. Haynes, 589 F.2d 811 (5th Cir. 1979) agreed. In Haynes a former police chief had been convicted of aggravated assault and depriving another of his right to liberty without due process of law, resulting in his death. On appeal, the defendant claimed he had been incompetent to stand trial because his competency had been attained through medication. The Fifth Circuit rejected this claim.

> Nonetheless, it is argued that without large doses of Aventyl (an anti-depressant) and Mellaril (an "anti-psychotic" drug), defendant would be incompetent.... The court's inquiry is limited to determining whether defendant is able to assist in his defense and comprehend the nature of the proceedings against him. Once it is determined that he is competent to stand trial, the method of achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings. U.S. v. Haynes, 589 F. 2d at 823 (5th Cir. 1979). (Emphasis provided).



The State of Louisiana respectfully submits that if a defendant's competency for trial may be constitutionally maintained and achieved by medication, then it is also constitutional that a death row inmate's competency for execution may be maintained and achieved by medication. Justice O'Connor stated in Ford that a death row inmate has fewer constitutional protections post-conviction than what were afforded him prior to conviction. "...[O]nce society, has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, 106 S.Ct. 2612 (O'Connor, J., concurring in part, dissenting in part). If synthetic sanity is acceptable at a time when the Constitution affords its greatest protection, then it must logically follow that synthetic sanity is acceptable when the Constitution's demands have diminished.

2. A death row inmate does not have a "right" to be free from nonconsensual medical treatment that is designed to achieve and maintain competency for execution.

The State has chosen the word "right" to define whatever Perry is claiming for lack of a better word. The first question is: what is the "right"? Is it the "right" to be free from involuntary medication? In the context of a death penalty case, this "right" would have even more implications. Of crucial importance is that the medication is designed to achieve and maintain competency for execution. If this Court were to recognize a death row inmate's "right" to refuse medication, a necessary corollary question would arise: Does a death row inmate have the "right" to induce insanity? A diligent search by the State found no guidance from this Court on whether Perry would have a constitutionally recognized right to be free from a medication that is designed to achieve and maintain competency, and thereby have a "right" to induce

insanity. The source of such a "right" is also unclear in this Court's jurisprudence, on whether it may be a liberty interest or a state-created interest enforceable through the Due Process Clause. Perry has neither identified the authority that supports his claimed liberty interest, nor proven its source from either federal or state law. Instead, the petitioner has asserted his rights in a laundry-list fashion without further explanation. (Pet.'s Brief, p. 23)[4]

The State of Louisiana is not willing to concede that Perry has a protected liberty interest to avoid forcible medication with the antipsychotic drug Haldol. This Court has not declared such a right. In fact, in Mills v. Rogers 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), Justice Powell expressly reserved the ability to address the question of whether such a "right" does exist under the federal constitution itself. The Mills case was a class action suit by mental patients who were claiming, among other things, that the forcible administration of antipsychotic drugs violated their rights under the federal constitution. The parties involved accepted as a given that this protected liberty interest existed under the federal constitution. In dismissing such a "right", Justice Powell stated:

> As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution,...and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only 'assuming' the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests. Mills 102 S.Ct. at 2448, (Footnote No. 16; citation omitted).

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4. Because the petitioner's counsel in their brief to this Court discussed the Eighth and Fourteenth Amendment arguments in a illogical manner, the State of Louisiana was unable to distinguish exactly what "rights" the petitioner was claiming were violated, and from what source those "rights" emanated. Therefore, the State has chosen to address issues it believes are underlying this petition, and then address the petitioner's concerns in relation to those issues. The State will not re-address issues based on state law. Those issues including the standard of competency for execution in Louisiana are briefed in Appendix A. The Louisiana Supreme Court in State v. Perry, ____ So.2d _____(La. 1989) Nos. 88-KD-2239 and 89-KA-0159, (May 12, 1989; reconsideration denied, State v. Perry, ____ So.2d ___ (La. 1989) (June 16, 1989) ruled against the petitioner.



Until directed otherwise, the State is hesitant to recognize a "right" that has no textual source and has not been identified by this Court as emanating from the Constitution itself. Therefore, there is no presumption in the case at bar that such a "right" exists.

(a) Assuming arguendo that a death row inmate does have a constitutionally protected liberty interest, that interest was extinguished upon the imposition of a valid death sentence.

If this Court should find that such a protected liberty interest does exist, the State responds that a death row inmate's interest in . . free from a medication that is designed to achieve and maintain competency for execution was extinguished upon the imposition of a sentence of death. Such an extinguishment of a liberty interest is understood in many contexts. For instance, a defendant loses his liberty interest to be free from confinement once a jury returns a verdict of guilty as charged. In a death penalty case, the condemned inmate further loses his right to life once a legally imposed sentence of death is declared. A death row inmate's status alone mandates special consideration not found in any other context. For instance, the liberty interest of an involuntarily committed individual who has committed no crime cannot be on par with an individual who is responsible for five brutal killings. We must not forget that the medication is aimed at achieving and maintaining competency for carrying out the jury's decision. Society itself demands only one conclusion. Any liberty interest Perry may have had was extinguished when the jury rendered its sentence of death.

This Court in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976), 49 L.Ed.2d 451 recognized that a prisoner who was validly convicted and sentenced does not retain a liberty interest to remain in any one particular prison. On the contrary, the state has the authority to transfer the prisoner to any of its prisons. The court stated: "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in ANY of its prisons." Meachum 96 S.Ct. at 2538, (Court's emphasis).

Perry was placed on death row with the expectation that some day, after he had exhausted all avenues of appeal, the State of Louisiana would execute him. Perry's expectation, therefore, is opposite to that of the inmate in Vitek v. Jones,

445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980). Justice White, in writing for the majority, had held that the involuntary transfer of an inmate from a prison to a mental hospital did require procedural protections under the due process clause, based upon a liberty interest created by a Nebraska statute that had allowed for such a transfer. The Court's reasoning focused on the fact that the prisoner could not have reasonably anticipated confinement in a mental hospital at the time he was convicted and sentenced. In contrast, Perry knew that the State of Louisiana would do everything within its power to carry out the legally imposed sentence of death. Medication to achieve and maintain competency for execution is within the range of expectations likely to confront any condemned inmate whose mental illness had been judicially established. Perry himself has raised the shield of mental incompetency as a reason not to carry out a lawfully imposed sentence. Do we now let him turn that shield into a sword by refusing medication in an attempt to thwart society's legitimate interest in retribution? Implicit in the death row inmate's questioning of his competency is the State's authority to treat him if necessary to achieve or maintain competency for execution. Medication of a mentally ill inmate is reasonably expected. In direct contrast to Perry's case, the inmate in Vitek could not have expected that his prison term would include involuntary transfer to a mental hospital. For Perry, it is within the range of conditions of his conviction and sentence that he submit himself to treatment so as to maintain his competency to be executed.

The State of Louisiana also maintains that nonconsensual medication to achieve and maintain competency is within the legitimate limits of this State's authority to carry out Perry's sentence. This Court in Montanye v. Haymes 427 U.S. 236, 96 S.Ct. 2543 (1976), 49 L.Ed.2d 466 stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye 96 S.Ct. at 2547. The medication of Perry is a necessary concomitant to carrying out his sentence of death. Therefore, any liberty interest to refuse reasonable and nonarbitrary medical treatment was extinguished contemporaneously when Perry's liberty interest to life was extinguished - that is, when Perry's sentence of death was imposed.

The State does recognize that Perry may still retain a residual liberty interest. While a conviction and subsequent



death sentence greatly diminish a death row inmate's constitutional rights, he does not forfeit all such protections. Wolff v. McDonnell 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) recognized that "the touchstone of due process is protection of the individual against arbitrary action of government." The State concedes that Perry may have a liberty interest to avoid experimental drugs or extreme medical procedures that are outside the mainstream of professional medical practice. Haldol is not such a drug; it is a well recognized, medically acceptable treatment for anyone suffering from schizoaffective disorder. The nonconsensual administration of Haldol to Perry is an appropriate and reasonably anticipated measure by the State of Louisiana to assure his competency for execution.

(b) In the alternative that a condemned inmate does retain a liberty interest to refuse medication despite his conviction, the State has an overriding interest to ensure that his death sentence is implemented.

Assuming the condemned inmate has a liberty interest under the Fourteenth Amendment to refuse mental health treatment and thereby induce insanity, the State has an overriding interest to seek retribution under a validly imposed death sentence. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) this Court recognized a balancing of the state's legitimate security interests against the inmate's privacy interests when it held that the Fourth and Fifth Amendments did not prohibit the visual body-cavity searches of pre-trial detainees following contact with outside visitors. The Court found that the search was a reasonable response to a legitimate security interest.

In this case, the State of Louisiana is asserting that its legitimate interest of retribution outweighs any retained liberty interest by the condemned inmate to refuse medication that is designed to achieve and maintain competency for execution. If necessary, the state should have the authority to forcibly medicate Perry so that the execution may proceed. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) this Court reaffirmed that the Eighth Amendment is subject to a flexible interpretation that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 598 2 L.Ed.2d 630 (1958). State legislatures by statute have approved forcibly medicating inmates if necessary. The jurisprudence of this Court indicates that only excessive punishment, either because it involves the

unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime, is prohibited under the Eighth Amendment. Execution while the inmate is medicated with Haldol is neither excessive nor disproportionate. The State of Louisiana contends that Perry had not proven that his execution effectuated through the nonconsensual treatment with Haldol is a sanction that is imposed without any penological justification and "results in the gratuitous infliction of suffering." Gregg 96 S.Ct. at 2929. Perry's medical treatment is not being inflicted in an arbitrary or capricious manner; it is the same treatment afforded anyone with schizoaffective disorder. Perry just happens to also be on death row. To allow Perry a constitutional right to refuse medical treatment that is designed to achieve and maintain competency for execution is to deny the people of the State of Louisiana their legitimate right to retribution. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

The Ford opinion itself recognized the state's interest in retribution, thereby requiring that the condemned inmate know of his impending death and the reason for it. Otherwise, if the inmate lacks this capacity, his execution as to him is meaningless. Justice Powell called the state's interest in carrying out a validly imposed death sentence "a substantial and legitimate interest in taking petitioner's life as punishment for his crime." Ford 106 S.Ct. at 2610 (Powell, J., concurring).

Other factors in the balancing of interests prove that the benefits of the Haldol medication outweigh any possible side effects. There is no evidence in the record that Perry has suffered any side effects. It is also important to note that a symptom of the illness is to refuse medication. Medication is also required as a starting point before any behavior modification therapy may be administered. The only adverse impact that Perry has alluded to is the possibility of contracting tardive dyskinesia five years from now, and then the chances of that occurring are, at worst, one in four.

Opposing counsel in their brief to this Court conceded that an incompetent inmate could be forcibly medicated by the state. Their brief to this court repetitiously recites that



Perry is insane. The record, however, fails to prove that Perry has ever been adjudged insane, either at the commission of the crime or at trial. Assuming arguendo that Perry was and is insane, his counsel then asserts: "Non-consensual medication is permitted only upon a finding of incompetence." (See Pet.'s Brief, p. 11). This assertion leads the State to conclude that our opposing counsel has conceded to the state its authority to medicate Perry against his will "upon a finding of incompetence.".

3. The State of Louisiana has a duty to provide medical treatment to all prisoners including mentally ill death row inmates.

Beginning with the premise that Perry is insane, as his counsel so adamantly argues, Perry's lawyers then also posit that Perry is competent to refuse needed medical treatment. In other words, an "insane" murderer knows treatment with Haldol is not in his best interest. The lack of logic of this argument is self-evident. However, even if one ignores this nonsensical line of reasoning, opposing counsel still has yet to address a very important argument that supports nonconsensual medical treatment - that is, the affirmative duty placed upon the State of Louisiana to provide adequate medical care to its incarcerated inmates.

In Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), this Honorable Court recognized a state's legitimate interest under its parens patriae power to provide adequate medical care for its mentally ill citizens. At stake also was the state's police power to protect the community at large from an individual who was a danger to others. Inside the walls of Louisiana State Penitentiary at Angola, there can be little doubt that an unmedicated Michael Perry would be a danger to other inmates and the institution's employees, as well as a danger to himself. One need only look at the numerous suicide watches called at Angola to protect Perry from himself and others.

Putting these concerns aside, even if this Court were to grant Perry the authority to refuse all antipsychotic medication, the State of Louisiana would be placed in a Catch-22 situation. The State could not forcibly medicate Perry, while at the same time, the Eighth Amendment under Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981) requires a state to provide adequate psychiatric care to incarcerated inmates. If an inmate proves that the penitentiary has shown a

"deliberate indifference" to his psychiatric needs, then the inmate has stated a cause of action under 42 U.S.C.A. § 1983. The Haldol treatment Perry has received is a necessary and reasonable psychiatric treatment required for his mental health and well-being. It would indeed be anomalous for this Court to hold that this very treatment required by the Eighth Amendment would at the same time violate that same amendment.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court held that deliberate indifference to an inmate's medical needs was cruel and unusual punishment under the Eighth Amendment. Would it not indeed be cruel and unusual punishment for the State of Louisiana to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations? Would this mental torture be the infliction of pain without any legitimate penological purpose? The State of Louisiana posits that such indifference would violate Perry's rights under the Eighth Amendment. Therefore, this Court must recognize Louisiana's parens patrie power to administer, forcibly if necessary, antipyschotic medication to a mentally ill inmate. As Blackstone once said, the sovereign or his representative is "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 255, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972) , citing from 3 W. Blackstone, Commentaries 47. Based on its parens patrie power, Louisiana has the power to do what is best for its citizens, including mentally ill death row inmates.

4. Federal and state statutory laws support the State of Louisiana's position that a finding of incompetency mandates the necessity of medical treatment.

The State of Louisiana will fully discuss in its argument on Issue II, infra, the reasons that support the State's position that the trial court's finding of competency, but competent only while medicated, implied the necessity of medical treatment, either with or without Perry's consent. At this point it suffices to state that both federal and Louisiana statutory law subsumes the necessity of medical treatment within a finding of mental incompetency.

Under 18 U.S.C. § 4245, once a pre-trial detainee is declared incompetent to stand trial, the individual is ordered to the custody of the U.S. Attorney General for treatment. In pertinent part, the statute provides:



> "If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General SHALL HOSPITALIZE THE PERSON FOR TREATMENT in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier." (Emphasis provided.)

This federal statute is based on the premise that once an individual is judicially determined to be incompetent to stand trial, the individual is then committed to a suitable facility for care or treatment. Under 18 § 4243 an insanity acquittee may be conditionally released on an order that the individual comply with a prescribed regimen of medical care.

As argued extensively in our brief to the Louisiana Supreme Court (see Appendix A, pp. 116-169), the State's position is that Louisiana's statutory law subsumes the necessity of medical treatment within a finding of incompetency. Simply stated, when Perry raised the issue of his competency to be executed, he implicitly authorized the State to medicate him if necessary to achieve and maintain competency. While Louisiana has no statutory laws governing competency to be executed, all other similar statutes dealing with competency to stand trial, civil committees, inmates who are found to be a danger to themselves or others, insanity acquittees, and probationers or parolees, imply an authorization to administer medical treatment once incompetency has been established. For example, La. C.Cr.P. art. 648 provides, in pertinent part, that the court "shall commit the defendant...for...treatment, as long as the lack of capacity continues." If a Louisiana court can constitutionally order a pre-trial detainee under art. 648 to submit to medical treatment once incompetency is established, the State must certainly have the same power over a death row inmate, who has invoked the shield of incompetency as a means to stay his execution. Furthermore, La. R.S. 28:55(I) provides in pertinent part regarding involuntarily committed persons that "[a] patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent...." It would be anomalous if a civil committee can be treated without his consent and a death row inmate cannot be so treated.

5. Petitioner has failed in his burden of proof to show any national consensus against forcibly medicating a condemned prisoner.

In determining the "evolving standards of decency that mark the progress of a maturing society," as announced in Trop v. Dulles, supra, this Court has looked not to the individual standards of decency held by each justice, but to society's standards of decency, especially those standards reflected in the statutes enacted by society's elected representatives. This practice of referring to the laws of the fifty states was followed by this Court in its major death penalty cases including Ford, Penry and Stanford v. Kentucky, ___U.S.____, 109 S.Ct. 2969, ___L.Ed.2d ____ (1989). The State of Louisiana respectfully submits that the petitioner has not established a national consensus against forcibly medicating a death row inmate in order to achieve and maintain competency for execution. Unless Perry does so, his claim that nonconsensual treatment violates his Eighth Amendment right lacks merit.

Finally, Perry has also failed to point to any conflict in the district courts as to forcibly medicating either involuntarily detained civil committees or pre-trial detainees. In U.S. v. Charters, 863 F.2d 302 (4th Cir. 1988), the Court of Appeals, on rehearing, held that a pre-trial detainee who had been found incompetent to stand trial could be forcibly medicated, as long as the government's action was not arbitrary or capricious, and as long as professional medical judgment was exercised and subject to judicial review. The Third Circuit of the U.S. Court of Appeals in Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983) held that a civil committee who was involuntarily placed in a mental facility could be forcibly medicated, provided accepted professional judgment was exercised and provided that the treatment regimen was one accepted within the medical community. The State of Louisiana argues that in the context of a death penalty case, the state's countervailing interest in retribution should override any interest Perry may retain in refusing antipsychotic medication. The medication is administered to Perry only under the exercise of professional medical judgment. Because the petitioner can point to no conflict in the district courts, and because the petitioner does not contend that any Louisiana statute as applied to him is unconstitutional, he has not supported his contention that a writ of certiorari should be granted.



ISSUE II.

Assuming that: (1) competency to be executed may be medically achieved and maintained through nonconsensual, medically supervised treatment; and (2) the condemned inmate has a remaining constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to such treatment?

A. Pretext

The petitioner asserts that he is (1) insane and/or incompetent; (2) that he has a right to refuse medical treatment designed to achieve his competency to be executed; and (3) that the trial court violated his procedural due process rights in the conduct of the hearing to determine competency to be executed and the subsequent order to submit to medical treatment.

Several matters must be addressed prior to beginning an analysis of these assertions. The State notes that the above issues are outlined by the undersigned writer. This was done because the inmate's several lawyers have failed to coherently delineate and analyze the issues. It was left to the respondent to discern their complaints from a confused, inarticulate petition for certiorari.

Second, it is important to recognize that this inmate has never been declared either insane or incompetent prior to or during the trial of this horrendous crime. Although inmate's counsel states in his third sentence of the brief that Perry "was found incompetent to proceed to trial several times", (see Pet.'s Brief, p. 4), such contention is simply incorrect. There is absolutely no such conclusion anywhere in the trial record. Such a misstatement is an example of inmate counsel's petition, which is replete with mischaracterizations.

Third, the claimed right to refuse medical treatment (designed to achieve competency to be executed) cannot be an absolute, categorical precept. If it were, then we would be giving the death row inmate the universal authority to choose a life of madness over a valid sentence of death. The right to refuse medical treatment must necessarily be a flexible right which is hinged on several variables. As stated in Argument I

supra, the inmate's right to refuse medical treatment is either extinguished upon rendition of a valid sentence of death, or, it is a right which must be weighed against state interests on a case-by-case basis.

Fourth, it is pertinent that this death row inmate has never been compelled to accept undesired medical treatment. Although inmate's counsel would have this Court believe that he was medicated in violation of a Louisiana Supreme Court stay order, (See Pet.'s Brief, p. 21, Note 12), this contention is erroneous. In short, this same contention was presented to the Louisiana Supreme Court and its answer was a writ denial. _____ So.2d _____ (La. 1989) (Nos. 88-KD-2239 and 89-KA-0159) (May 12, 1989) reconsideration denied, ____ So.2d _____, (La. 1989)(June 16, 1989). More important, is the fact that this inmate can point to no evidence in the record which buttresses his argument that he has been subjected to unwanted medical treatment. The testimony of several physicians demonstrates that Perry improves with medication and occasionally requests that he receive treatment. Thus, it appears that the matter now under consideration does not focus on an alleged deprivation of an assumed right to refuse medical treatment, but focuses upon an anticipated deprivation of the assumed right to refuse medical treatment. The anticipated deprivation to supposedly arise from the trial court's order. The trial court determined Perry to be competent when medicated and consequently ordered the Department of Corrections medical staff to provide nonconsensual medical treatment in order to maintain his competency to be executed. The condemned inmate is now applying for certiorari based upon treatment he anticipates occurring in the future.

This opposition to petition for certiorari rests upon several givens and assumptions. Given is the fact that the State of Louisiana has a death penalty for first degree murder. See LSA-R.S. 14:30. Also given is the fact that Ford v. Wainwright, supra, requires an inmate to be competent in order to be executed.

Assumed, is the proposition that medically achieved and maintained competence is sufficient to satisfy the Eighth Amendment right enunciated in Ford. Also assumed is the condemned inmate's proposition that he has a protected liberty interest in refusing medical treatment designed to achieve



competency to be executed.[5]

In view of the above givens and assumptions, the remaining questions are:

> (1) Was the trial court's determination of incompetency made in accord with procedural due process as set forth in Ford v. Wainwright?
>
> and
>
> (2) Did the trial court err in ordering treatment (to achieve competency) premised upon a determination of incompetency. Restated, does procedural due process require a second adversarial, adjudicative determination prior to treatment if the inmate refuses treatment?

B. Argument

> The proceedings below conclusively demonstrate that the death row inmate was correctly ordered to receive nonconsensual, medically supervised treatment designed to achieve competency to be executed; all in accord with procedural due process as mandated by the Fourteenth Amendment through Ford v. Wainwright.

1. The trial court's determination of incompetency (i.e., competency achieved through the use of antipsychotic medication) was made in accord with procedural due process as set forth in Ford v. Wainwright.

The trial court ruled as follows:

> For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or

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5. Implicit in the claim of, or recognition of, any liberty interest to refuse treatment is the apparent negating of the inmate's initial claim that mental illness per se is a bar to execution. This argument is apparently unacceptable in view of Penry v. Lynaugh. In Penry, this Honorable Court rejected the proposition that retardation per se, pursuant to the Eighth Amendment, precludes the imposition of the death penalty.

antipsychotic drugs, including Haldol, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection. (R. pp. 43-44).

In view of the trial court's ruling on competency and accompanying order of treatment, we must necessarily address the questions of: (a) What procedural due process must accompany the inquiry into competency to be executed; (b) What procedural due process in fact accompanied the trial court's determination of Perry's competency to be executed; and (c) Did the trial court err in the conduct of the competency hearing?

(a) The procedural due process essence of Ford, which is designed to govern the inquiry into competency to be executed, requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker.

Initially, we must recognize that the Ford court addressed two issues. The first issue was whether there was an Eighth Amendment substantive right not to be executed while insane. A majority of the Court agreed on this issue. Second, there was the issue of what procedures must accompany the inquiry into sanity. This Court debated over the question. Justices Marshall, Powell, O'Connor and Rehnquist expressed differing opinions on the matter.

Louisiana commentators have concluded, "[t]he procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive." Note, Ford v. Wainwright: Warning -- Sanity on Death Row May Be Hazardous To Your Health, 47 La. L.Rev. 1351, 1355 (1987). There is no other evidence of consensus.

The State of Louisiana, suggests that procedural due process must satisfy basic fairness by providing the condemned with:

(1) Inclusion of the prisoner in the truth seeking process (i.e., the "opportunity to be heard") (based on the expressions of seven justices, but for Justices Rehnquist and Burger);



(2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (J. Marshall's plurality);

and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (J. Marshall's plurality and J. Powell's concurrence).

The State of Louisiana submits that Perry was afforded procedural due process in excess of constitutional requirements.

(b) The procedural due process which in fact accompanied the trial court's determination of Perry's competency to be executed exceeded de minimus federal constitutional standards.

The condemned inmate was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The procedural protections afforded to him exceeded even the most strident prerequisites of Ford. Basically, the trial court afforded to the inmate:

(i)The privilege of assistance of counsel;

(ii)The privilege of compulsory process;

(iii)The right to present evidence on his behalf;

(iv)The opportunity to choose half of the members of the sanity commission which evaluated him;

(v)The right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi)The privilege to participate in an adversarial hearing;

(vii)The privilege to testify as a witness and be videotaped for posterity;

(viii)The right to an independent and neutral decisionmaker outside of the executive branch of government;

(ix)The privilege of judicial review.

For a more detailed explanation of each of these rights and privileges, refer to the State's Opposition to Petition for Supervisory Writs, Louisiana Supreme Court, March 30, 1989. (Attached hereto as Appendix A). Specifically, refer to Section XI.

The only remaining question is whether some error occurred during the hearing process.

(c) The trial court's conduct of the competency hearing was impeccable, and certainly manifested no error of constitutional dimensions.

The inmate's petition for certiorari offers a smorgasbord of alleged trial court errors. (See Pet.'s Brief, pp. 30-35). All available "buzzwords" were shoveled to this Honorable Court. The complaints lack merit. Each of the current allegations was addressed and rebutted in the State's brief to the Louisiana Supreme Court (See App. A). Specifically, Sections XI(B)-(E), pp. 173-212, respond to and disprove the current arguments that the trial court erred during the conduct of the competency hearing.

Petitioner inmate now proposes that the trial court erred in accepting three updates on the inmate's medical condition. He characterizes the reports (which were filed in the trial record) as "ex parte Communication with the State." (See Pet.'s Brief, p. 30). Such characterization is inaccurate in light of the fact that the reports were offered by amicus curiae, who was custodian of the inmate, and were contemporaneously filed in the trial record for all parties to examine and act upon.

The State respectfully suggests that the trial court's receipt of continuing medical updates of the condemned inmate was not error. In fact, we suggest that it was highly pertinent and relevant material, without which, the factfinder may have made an ill-informed judgment concerning the inmate's fate. An ill-informed judgment can not be countenanced by anyparty or court. See Ford, supra, at 2606 and Ford, at 2611 (Powell, J., concurring).

Furthermore, we believe that there is an affirmative duty on the part of custodians who are entrusted with the treatment of incompetent inmates to periodically update the committing court. For example, in United States v. Curry, 410



F.2d 1372 (4 Cir. 1969) the Fourth Circuit stated that there "should be a requirement that the custodian report to the court on a prescribed schedule the mental health of his ward." at p. 1374. Also, in In re Harmon, 425 F.2d 916 (1 Cir. 1970) the First Circuit set out guidelines for psychiatrists who are responsible for the treatment of pre-trial detainees determined to be incompetent to stand trial. The Court stated "if the accused is committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246, the district court should require frequent reports on the accused's mental condition at stated intervals." at p. 918. Also see United States v. Geelan, 520 F.2d 585 (9 Cir. 1975).

Based on Ford's dictate that competency decisions be premised upon all available evidence; and upon Justice Powell's concurrence "that ordinary adversarial proceed[ings] ... are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" -- Ford, supra, at p. 2611 -- as well as the aforecited circuit court's expectation of medical updates by custodians; we suggest that the trial court committed no violation of procedural due process guaranteed to the condemned inmate.

To summarize, the trial court's conduct of the competency proceedings exceeded the procedural due process required by this Honorable Court in Ford. Moreover, the trial court committed no error of constitutional dimension by accepting medical updates on the condition of Michael Owen Perry. Therefore, petitioner's application for certiorari should be denied.

2. The trial court correctly ordered treatment of the condemned inmate based upon the determination of incompetency to be executed (i.e., competent only when maintained on medication.)

It is important to immediately recall that the trial court found that Perry was "competent for execution ....only while maintained on psychotropic medication in the form of Haldol." (R. p. 41). From this determination, we respectfully suggest that Perry may be incompetent when treatment is either denied or refused. The trial court's conclusion that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment. We believe that the trial court acted correctly when he ordered the Department of Corrections medical staff to treat Perry to maintain competency for execution.

The condemned inmate seems to argue that the trial court acted improvidently by ordering treatment without an additional adversarial, adjudicative determination on the subject of Perry's incompetency to make treatment decisions. This contention is misplaced.

There are several facts which are relevant to a determination of whether due process requires multiple adversarial, adjudicative proceedings. First, we must recall that the trial court concluded, as a matter of law, that Perry is competent only when medicated. Second, it is abundantly clear that he is not competent for execution, according to Ford, when not properly administered antipsychotic medication. Third, the doctors and the trial court agree that Perry is in need of medication because of his condition. Fourth, all doctors agree that Perry improves, to the level of competency to be executed, with the administration of antipsychotic medication. Fifth, the administration of antipsychotic medication is an approved and recommended treatment regimen for the diagnosed condition of schizoaffective disorder. And sixth, Perry has asserted, claimed and carried the burden of proving his (A) incompetency to be executed when unmedicated and (B) his need for treatment.

The combination of factors listed above mandates a finding that the trial court correctly ordered treatment of the condemned inmate premised upon a single finding of incompetency to be executed without treatment.

(a) This Court's decision in Vitek v. Jones implicitly recognizes and authorizes nonconsensual medical treatment upon a due process determination that treatment is necessary.

In Vitek v. Jones, 445 U.S. 80, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) an inmate brought an action challenging the constitutionality, on procedural due process grounds, of a Nebraska statute which allowed the Department of Correctional Services to transfer any prisoner to a mental hospital upon a physician's finding that the prisoner is suffering from a mental disorder. The issue, according to Justice White, was whether the involuntary transfer of a Nebraska state prisoner to a mental hospital for treatment implicates a liberty interest that is protected by the due process clause. This Court held that Jones' transfer to a mental hospital for the purpose of psychiatric treatment implicated a liberty interest protected by the Due Process Clause. Vitek, 100 S.Ct. at 1264. The apparent rationale for this Court's conclusions of a liberty interest insured by procedural protections was "the



stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness ....Ibid; emphasis provided.) Further, this Court identified the prisoner's interest as "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment...." Vitek, 100 S.Ct., at 1265. (Emphasis provided).

The above passages reveal this Court's finding that treatment necessarily follows a transfer to the mental hospital. Such finding is quite relevant to the current issue. The trial court below determined that treatment was authorized after a finding that treatment was necessary. In Vitek, this Court approved of a similar analysis. That is, once Nebraska determined the need for transfer (i.e., that the prisoner suffered from a mental defect which required treatment), then the authority to treat was available to the hospital officials. Implicit is that the hospital officials did not have to return to court for an additional adversarial, adjudicative proceeding to determine if the prisoner is competent to make decisions regarding his treatment. The determination of need for treatment in Jones' case was the authority for hospital officials to subject him to "involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...." Vitek, 100 S.Ct. at 1264. The State suggests that the trial court's conclusion of need for treatment is sufficient authority for the Department of Corrections medical staff to involuntarily administer antipsychotic medication to the condemned inmate. There is no need to conduct an additional hearing on the question of competency to refuse medication.

Recognition of the notion that an inmate is entitled to a single hearing prior to initiation of involuntary treatment is found in Baugh v. Woodard, 808 F.2d 333 (4 Cir. 1987). In Baugh, the Fourth Circuit rejected a suggestion that a due process required hearing must occur prior to the inmate's physical transfer to a mental health unit and before involuntary treatment began. Baugh, 808 F.2d at. 337.

In Stensvad v. Reivitz, 601 F.Supp. 128 (W.D. Wis. 1985) an involuntarily committed mental patient brought an action challenging nonconsensual drug treatment. At issue was whether a Wisconsin statute, which provided for no right to refuse drug treatment on behalf of involuntarily committed mental patients, was unconstitutional. The Court rejected the

constitutional challenge stating "that an involuntary commitment is a finding of incompetency with respect to treatment decisions. Nonconsensual treatment is what involuntary commitment is all about." Stensvad, 601 F.Supp, at 131. From Stensvad, it appears that Vitek has been interpreted to mean that a decision to commit amounts to the authority to treat despite the expressed desires of an involuntarily committed mental patient. Further, if such an interpretation of Vitek can apply to a mental patient, we suggest it applies with even greater force to a death row inmate.

In Lappe v. Loeffelholz, 815 F.2d 1173 (8 Cir. 1987) an inmate brought a 1983 action against prison officials to challenge the forcible injection of medication without a hearing as a violation of due process. At issue was whether the prison officials were entitled to qualified immunity on the basis that no right to refuse forcible medication had been "clearly established" by Vitek jurisprudence. "Lappe argue[d] that Vitek [citation omitted] clearly established that the fourteenth Amendment entitled him to another hearing before he could be subjected to forced behavior modification." (Emphasis provided.) Lappe, 815 F.2d at 1176. The court rejected Lappe's contention. The court reasoned that "[O]nce Lappe was given a full hearing on the issues of his involuntary commitment and need for medication, it is not clear that the forced administration of Haldol deprived him of the protections established in Vitek." Ibid. The court also stated that "Lappe's liberty interest in not being classified and treated as a mentally ill individual was extinguished when he had his first hearing according to the procedures established in Vitek." Lappe, 815 F.2d at 1177.

Like Lappe, Perry received a trial court determination of his incompetency and corollary need for treatment. Like Lappe, Perry has received all necessary procedural due process prior to a nonconsensual, medically supervised administration of antipsychotic medication. Vitek and its progeny simply do not require an additional adversarial, adjudicative hearing prior to the forcible administration of medication which will maintain competency to be executed. Simply put, a single hearing and finding of incompetency is sufficient to authorize treatment by medical officials.

This position is supported by Dautremont v. Broadlawns Hospital, 827 F.2d 291 (8 Cir. 1987). In Dautremont, a former psychiatric patient brought a 1983 action against a hospital and physicians for deprivation of due process arising out of the involuntary administration of psychotherapeutic drugs. The court rejected the claim. Most significant to this case is



that the court accepted an Oklahoma commitment hearing as satisfaction of Iowa's authority to forcibly treat the patient. The court stated that "the pre-Oklahoma hospitalization hearing provided Dautremont all the process he was due in these circumstances." Dautremont, 827 F.2d at 197. This conclusion, of no need for a second hearing by a different state is indeed remarkable. It forcefully demonstrates that a second hearing would be duplicitious and fail to meaningfully advance any interest protected by the due process clause.

The State of Louisiana suggests that Dautremont is authority for the trial court's conduct of Perry's proceedings. The trial court's conclusions of competency only when medicated; Perry's need of the medication; the fact that Perry improves with the medication; the determination that the medication is an approved form of treatment for the illness; and the recognition that Perry proved his own need for treatment all support our contention that the trial court correctly ordered involuntary treatment.

(b) Should there be a due process requirement of an additional authorization to treat the condemned inmate; then Youngberg v. Romeo and U.S. v. Charters dictate that such decision is left to the professional judgment of the appropriate medical personnel at the custodial institution.

Alternatively, if this Honorable Court determines that: (1) a finding of incompetency to be executed does not amount to authority to involuntarily treat the condemned inmate; and (2) that the inmate retains a residual liberty interest in deciding whether to accept medical treatment designed to maintain competency; then the State suggests that the decision to involuntarily treat be left to the "professional judgment" of supervising doctors rather than an additional adversarial adjudicative proceeding.

In Youngberg v. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) this Honorable Court considered several questions, among them what was the proper standard for determining whether a state has adequately protected the rights of the involuntarily committed mentally retarded. If we assume that (1) inmate Perry's right to refuse medical treatment exists despite his conviction and sentence, and (2) that he retains a liberty interest as great as Romeo's; then we must determine how Perry's interests are to be judged and by whom. We suggest that Youngberg answers this question. This Court stated in Youngberg that "the decision, if made by a professional, [footnote omitted] is presumptively valid,

liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [footnote omitted]" Youngberg, 102 S.Ct. at 2462.

The Youngberg court seems to suggest that Perry's right to refuse medical treatment (designed to achieve his competency) can be assessed by professionals in the course of their duties rather than by an additional adversarial adjudicative proceeding.

In United States v. Charters, 863 F.2d 302 (4 Cir. 1988) (rehearing en banc), cert. applied for _____ U.S. _____, 44 Cr.L. 4178 (Feb. 14, 1989), an involuntarily committed pre-trial psychiatric patient appealed a district court order permitting the nonconsensual administration of antipsychotic medication. [6] The Charters issue may be restated as follows: Does the nonconsensual administration of antipsychotic medication, without a judicial determination that the patient is incapable of making his own medical decisions, unconstitutionally impinge upon protected liberty interests? The court, on rehearing, essentially concluded that the base-line decision to medicate should be made by appropriate medical personnel of the custodial institution, with judicial review available to guard against arbitrary governmental action.

The court stated "there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out." Charters, 863 F.2d at 314.

Further, the court rejected the proposition that an adjudicated incompetent (for commitment purposes) can simultaneously maintain his competence to decide his own "best interests in receiving or declining medication." Charters, 863 F.2d at 310.

6. The Fourth Circuit presumed that a legally confined person nonetheless retained an interest in refusing antipsychotic medication. In Charters, the government did not, as Louisiana suggests in II(A) above, assert that the supposed retained interests were displaced as "incidental to the basis for legal institutionalization." Charters, 863 F.2d at 305.



Counsel for the condemned inmate has suggested to both the trial court and the Louisiana Supreme Court that Perry is entitled to an additional adversarial, adjudicative proceeding to determine his competence to decline medical treatment. He has also suggested that it is incumbent upon the trial court to make a "substituted judgment" of Perry's "best interests" if it is determined that Perry is incompetent to refuse treatment.

The State of Louisiana contends that such requirements are unnecessary and unworkable. Without offering multiple rhetorical questions to demonstrate the folly in such an approach, let it be said that few sane death row inmates will choose death over life.

Prior to Charters, United States District Courts have recognized that is is the duty of doctors, not courts, to decide whether an inmate is competent to refuse medication. See U.S. v. Bryant, 670 F.Supp. 840 (D. Minn. 1987); and U.S. v Leatherman, 580 F.Supp. 977 (D.D.C. 1983).

It is not a new premise to suggest that confined persons are not entitled to an additional court hearing on the question of forcible medication. We likewise suggest that, if Perry even retains any protected interests after his sentence of death and after a due process hearing on his competency to be executed, an additional adversarial, adjudicative proceeding is not required before forcibly medicating him.

## CONCLUSION

Petitioner's writ of certiorari should be denied. First, there is no evidence in the record that the petitioner has been forcibly medicated with antipsychotic drugs. Second, the petitioner has also failed to carry his burden of proving a national consensus against forcibly medicating a condemned inmate. Finally, the petitioner's counsel has neither pointed to a conflict within the district courts, nor claimed Louisiana law as applied to the petitioner is unconstitutional. Therefore, the petitioner has stated no ground upon which certiorari could be granted. The State of Louisiana therefore entreats this Court to deny the petitioner's application for certiorari.

EAST BATON ROUGE PARISH
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Original Brief on Behalf of the State of Louisiana in Opposition to a Writ Application to the United States Supreme Court has been forwarded to Keith Nordyke, 427 Mayflower Street, Baton Rouge, La. 70802; Joseph Giarrusso, Jr., 643 Magazine Street, New Orleans, La. 70130; Annette Viator, Staff Attorney, La. Dept. of Corrections, P.O. Box 94304, Baton Rouge, La. 70804; and the Honorable L. J. Hymel, Jr., Judge, by placing same in the U. S. Mails, postage prepaid.

Baton Rouge, Louisiana, this 26th day of September, 1989.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: René Salomon
RENE SALOMON
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me, Notary Public, this 26 day of September, 1989.

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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NUMBER 89-

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MICHAEL OWEN PERRY,

PETITIONER,

VERSUS

STATE OF LOUISIANA,

RESPONDENT.

---

ENTRY OF APPEARANCE

---

NOW COMES Michael Owen Perry, petitioner and applicant for a writ of certiorari who enters the appearance of his counsel in this cause, all members in good standing of the bar of this Court.


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BY ATTORNEYS:

Keith B. Nordyke

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing writ application to the United States Supreme Court has been mailed to the Honorable L. J. Hymel, Judge, and to Rene Solomon, Office of the Attorney General, and Annette Viator, Department of Public Safety and Corrections properly addressed and postage prepaid on this 10th day of July, 1989.

Keith B. Nordyke

SWORN TO AND SUBSCRIBED before me, Notary Public, this 10 day of July, 1989.

NOTARY PUBLIC

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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NUMBER 89-

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MICHAEL OWEN PERRY,

PETITIONER,

VERSUS

STATE OF LOUISIANA,

RESPONDENT.

---



AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO APPLY FOR PETITION OF WRIT OF CERTIORARI
IN FORMA PAUPERIS

I, Michael Owen Perry, being first duly sworn, depose and say that I am the petitioner, in the above entitled case; that in support of my motion to proceed on application for writ of certiarari without being required to prepay fees, costs or give security therefor; I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of processing the application are true.

1. Are you presently employed?

No. Since 1983 I have been incarcerated at Louisiana State Penitentiary, Angola, Louisiana and am currently on death row at said penitentiary.

2. Have you received within the past twelve months any income from a business, profession or other form of self employment or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

No. I have an account at Louisiana State Penitentiary which currently is at $0.00. On occasion the acount has a few dollars for the commissary. I have no other money.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

6. I have not applied in any Court below for leave to proceed in forma pauperis although I intend to do so as necessary. To date, there has been no proceeding below requiring costs or prepayment of costs and the Courts below have treated my case as if I was in forma pauperis.

Mike Perry 111850
MICHAEL OWEN PERRY

SUBSCRIBED AND SWORN TO before me this 27 day of June, 1989.

NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE

89-5120

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NUMBER 89-

MICHAEL OWEN PERRY,

PETITIONER,

VERSUS

STATE OF LOUISIANA,

RESPONDENT.

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES Michael Owen Perry, petitioner and applicant for writ of certiorari who moves leave of court to proceed in this cause without prepayment of fees and costs for reasons set forth herein and in the attached supporting affidavits:

1.

Mover has been confined on death row, Louisiana State Penitentiary for over two (2) years and has been incarcerated continuously since 1983.

2.

Mover has no income, assets or means with which to pay costs as they may accrue.

WHEREFORE MOVER PRAYS that leave of court be granted for petitioner, Michael Owen Perry, to proceed in forma pauperis pursuant to Rule 46 of this Court.

BY ATTORNEYS:

Keith B. Nordyke, Bar Roll 8556
NORDYKE AND DENLINGER
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constitutionally obtained and to constitutional grounds for the suppression of a confession or statement of any nature made by the defendant. Absent constitutional implications, which is here the case, article 703 is inapplicable by its very language and does not support the use of a motion to suppress attorney-client communications.

The majority deems it best to require proof of the alleged conspiracy by a "preponderance of the evidence." I adhere to the belief the state need only establish a "prima facie" case of the underlying conspiracy in order to vitiate the attorney-client privilege pending final resolution of the merits of the claimed privilege. Our brothers on the federal bench agree. *United States v. Dyer*, 722 F.2d 174, 177 (5th Cir.1983), and cases cited therein. Adequate safeguard is provided by the constitutional constraint against being compelled to give testimony against oneself.

In all other respects, I agree with the majority.

**STATE of Louisiana**

**v.**

**Michael Owen PERRY.**

**No. 86 KA 0460.**

Supreme Court of Louisiana.

Nov. 24, 1986.

Rehearing Denied March 12, 1987.

Defendant was convicted in the Nineteenth Judicial District Court, East Baton Rouge Parish, Cecil C. Cutrer, J. ad hoc, of five counts of first-degree murder, and was sentenced to death, and he appealed. The Supreme Court, Cole, J., held that: (1) finding defendant was competent to stand trial was sufficiently supported by evidence; (2) defendant was properly allowed to withdraw dual plea and enter plea of not guilty; (3) confession made to jailer was admissible; (4) confession made to aunt was admissible; (5) statements made to officers while being transported to facility for psychiatric evaluation were admissible; (6) evidence seized at two murder scenes was admissible; (7) photographs of murder scene were admissible; (8) reference to defendant's theft of radio was not reversible error; and (9) death penalty was not excessive.

Convictions and sentence affirmed.

**1. Mental Health ⇐432**

Defendant who lacks capacity to understand proceedings against him or to assist counsel in preparing defense may not be subjected to trial. LSA-C.Cr.P. art. 641.

**2. Criminal Law ⇐625**

Defendant has burden of establishing incapacity to stand trial as result of mental disease or defects by clear preponderance of the evidence, because state law presumes defendant is sane and responsible for his actions. LSA-R.S. 15:432; LSA-C.Cr.P. art. 641.

**3. Criminal Law ⇐494**

Finding of homicide defendant's competency to stand trial was sufficiently supported by expert psychiatric testimony that defendant suffered from personality disorder or paranoid illness, though there were also diagnoses by nonpsychiatrists that defendant had more disabling thinking disorder of schizophrenia, where examining physicians were unanimous in their conclusion that defendant was able to proceed with trial.

**4. Criminal Law ⇐286**

Trial court properly permitted homicide defendant, over objection of his counsel, to withdraw his dual plea of "not guilty and not guilty by reason of insanity" and enter single plea of "not guilty" following finding of competency.

**5. Criminal Law ⇐531(3)**

Finding homicide defendant did not suffer from mental illness to degree necessary to result in exclusion of confession because of involuntariness was sufficiently supported by evidence that defendant was in contact with reality until he heard "trigger words" which were not part of conversation during confession, and confession given did not indicate rambling or jumping from subject to subject.

**6. Criminal Law ⇐517(6)**

Testimony of homicide defendant's aunt, regarding confessions defendant made to her, was admissible where aunt was not acting as agent for sheriff and did not question defendant on two dates he gave unsolicited confessions.

**7. Criminal Law ⇐412(4)**

Homicide defendant's statement regarding location of guns, made while being transported to facility for psychiatric evaluation, was admissible where accuracy of statement, which was borne out when police recovered guns from drainage canal which defendant suggested they search, showed defendant was in touch with reality when he made statements.

**8. Criminal Law ⇐412(1)**

Homicide defendant's statement regarding location of guns, made while defendant was being transported to facility for psychiatric evaluation, was admissible, though it was only part of conversation which took place during trip, where defense counsel did not object to statement on that ground during direct examination of officer, and in any event, officer was questioned thoroughly about defendant's conversation and testified as to information in addition to that concerning location of guns. LSA-R.S. 15:450.

**9. Searches and Seizures ⇐173**

Warrantless searches of home in which murders occurred were lawful consent searches where both surviving resident and caretaker consented to search when bodies were discovered and subsequent searches to collect evidence and remove items which required laboratory analysis.

**10. Searches and Seizures ⇐164**

Murder defendant could not object to warrantless search of his parents' home, in which murders occurred, where defendant lived in trailer behind parents' home, was not permitted in parents' home without their permission, and had no property inside home. LSA-Const. Art. 1, § 5; U.S. C.A. Const.Amend. 4.

**11. Criminal Law ⇐438(5), 661**

Homicide defendant cannot force State to use drawings or other evidence instead of photographs depicting victims and defendant cannot deprive State of moral force of its case by offering to stipulate as to what is shown in photographs.

**12. Criminal Law ⇐438(7)**

Color photographs of homicide victims and crime scene were admissible, though gruesome, where any prejudice was outweighed by relevance and probative value of photographs in proving corpus delicti, helping to identify victims, corroborating cause of death, types of weapons used and location and severity of wounds.

**13. Criminal Law ⇐369.2(4)**

Erroneous admission of state witness' oblique reference to homicide defendant's theft of radio was insignificant when weighed against five counts of first-degree murder for which defendant was on trial.

**14. Homicide ⇐354**

Use of color photographs of murder victims to prove that murders were committed in especially heinous, atrocious or cruel manner, did not introduce arbitrary or prejudicial factor into sentencing sufficient to require death penalty to be set aside. LSA-C.Cr.P. art. 905.9; Sup.Ct. Rules, Rule 28 (C.Cr.P. Rule 905.9.1), 8 LSA-R.S.

**15. Criminal Law ⇐730(5)**

Prosecutor's statement during sentencing phase that law required death sentence for persons convicted of first-degree murder was not reversible error where there was no objection and misstatement was





overcome by judge's subsequent instructions.

**16. Homicide ⇐354**

Jury did not overlook alleged mitigating circumstances in recommending death penalty for first-degree murder where jurors received conflicting medical testimony on defendant's mental condition and chose to believe State's experts that defendant did not suffer mental disorder so overwhelming that he was insane or unable to control or understand his actions.

**17. Homicide ⇐354**

Finding that murder defendant knowingly created risk of death or great bodily harm to more than one person, as aggravating circumstance in first-degree murder prosecution, was sufficiently supported by evidence that defendant killed five persons during single criminal episode.

**18. Homicide ⇐354**

Death sentence was not disproportionate to penalty imposed in similar cases where defendant shot five members of his family to death in their homes.

**19. Criminal Law ⇐981(1)**

Defendant convicted of murder and sentenced to death would not be executed if court determined he had become insane subsequent to conviction and lacked capacity to understand death penalty. LSA-C. Cr.P. art. 642.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Rene Solomon, Steve Laiche, Asst. Attys. Gen., for plaintiff-appellee.

Robert Mark Romero, Welsh, Richard Arceneaux, Jennings, for defendant-appellant.

COLE, Justice *.

Michael Owen Perry was indicted on five counts of first degree murder, in violation of La.R.S. 14:30. After deliberation during the guilt phase of his trial, the twelve person jury unanimously concluded defendant was guilty as charged on all five counts. Following the presentation of evidence during the sentencing portion of the trial, the jury unanimously recommended defendant be sentenced to death on each count. The jury found the same two aggravating circumstances existed for each crime: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious, or cruel manner. The trial judge subsequently imposed the death sentence.

Defendant on appeal relies on six assignments of error. The first three assignments of error concern statements made by defendant to various persons which the trial court ruled were admissible. Assignment of Error Number One contends the trial court erred in allowing the introduction of a statement given to Deputy Herbert L. Durkes, Jr. on September 15, 1983, while defendant was incarcerated at the Jefferson Davis Parish jail. In Assignment of Error Number Two, defendant argues the trial court should not have permitted the introduction of the testimony of his aunt, Zula Lyon, regarding statements defendant made to her. Assignment of Error Number Three involves the introduction of testimony of Deputy Ervin Trahan as it relates to a statement made by defendant while being transported by Trahan and Sheriff Dallas Cormier to the Feliciana Forensic Facility for psychiatric evaluation.

Defendant in the Fourth Assignment of Error complains of the admission into evidence of the objects seized at the two crime scenes, arguing their admission violates his Fourth Amendment right to be protected from warrantless searches and seizures. In Assignment of Error Number Five, defendant alleges the trial court erred in allowing the State to introduce numerous color photographs of the five homicide victims. The final assignment of error contends the trial judge erred in failing to grant defendant's motion for a mistrial following a state witness's reference to defendant's theft of a radio.

* Pike Hall, Jr., Associate Justice pro tempore, in place of Mr. Justice Lemmon.

We have added two issues not specifically addressed by counsel in brief to ensure full review, noting they were raised during oral argument. These issues are the finding of the sanity commission hearings and defendant's withdrawal of the dual plea of "not guilty and not guilty by reason of insanity."

We therefore treat in this opinion the six assignments of error, the additional issues, and we also review the sentence. Because we find no error in the trial court proceedings and find the conviction and sentence to be valid under the law, we affirm.

FACTS

The victims in this case were all related to defendant: two were his cousins, Randy Perry and Bryan LeBlanc; two were his parents, Grace and Chester Perry; and the fifth victim was defendant's two-year-old nephew, Anthony Bonin. They were shot in separate households located only two doors away from each other. The cousins died first in the residence located at 639 Louisiana Street in Lake Arthur, Louisiana. Defendant's parents and nephew died next, inside the Perry's home at 810 Seventh Street. The circumstantial evidence from which these facts were derived was presented by the prosecution through the testimony of a number of witnesses. Other information was obtained from a statement defendant gave to Deputy Herbert Durkes while defendant was incarcerated.

On July 17, 1983 defendant apparently entered the unlocked house on Louisiana Street in the early morning. He walked first to the living room couch where Randy Perry lay asleep. From a short distance of only a few feet, he fired into the left eye of his cousin. The accused then entered the bedroom where Bryan LeBlanc slept, and again fired the gun at the victim's head.

It appears defendant then walked across the yard to his parents' home at 810 Seventh Street and broke into the house. He listened to music for a while, awaiting his parents' arrival home from an out of town trip. His parents, on their return home, stopped to pick up the two-year-old, Anthony Bonin, whom they cared for when his father worked offshore.

At about the time the parents arrived home, several people in the vicinity heard loud noises or gunshots. In the statement defendant gave to Deputy Durkes admitting to the five murders, defendant indicated his father came through the door first, followed by the child and the mother. According to this statement, he shot his father first, then his mother, and then the child. There appeared to be some struggle with his father, whose body was found crouching behind the television in the living room. Because his first attempt did not kill either of his parents, he shot both of them a second time in the head. Not being sure the child was dead, he shot him a second time also. After dragging his mother's body away from the door so he could close it, he took his father's billfold containing $3,000 cash, and a strongbox belonging to his mother. He left the scene in his father's car.

The caretaker of the 639 Louisiana Street residence, Ernest Ashford, discovered the bodies of Randy Perry and Bryan LeBlanc shortly after 5:00 P.M. on July 19, 1983. The caretaker was the son-in-law of the owner of the house and the stepfather of Bryan LeBlanc. Ashford had a key to the house, and had entered the house out of concern for the diabetic Perry. Ashford notified police, who later entered the residence of Grace and Chester Perry and discovered the bodies of the other three victims.

Defendant became a suspect because of the bad relationship he had with his parents. Defendant lived in a trailer behind their home and was not allowed to enter their home without their permission. Zula Lyon, defendant's aunt, testified in the guilt phase of the trial that defendant's motive for the killings was to obtain insurance proceeds from his parents' policies. Another possible motive was the fact defendant's parents had taken him to a mental hospital in Galveston for examination when he was sixteen and had him committed to the Central State Hospital at Pineville two years later. According to testimony, he was infuriated at his parents for committing him and had consequently threatened to kill them. Interrogated as to why he killed the victims, Deputy Durkes gave this account of defendant's statement:

> Why did you kill all those people? The boys threw me out of my grandmother's house, stole money from me all the time, and harassed me constantly. My mother and father wouldn't leave me alone. They made me live in that little trailer behind their house by all those stinking dog pens. They took all my money all the time, wouldn't let me in their house when I wanted. I just couldn't take it anymore.
>
> I asked him why he killed the child. The kid was evil, some sort of devil, witch of some sort. I asked—I'm sorry. I said that the child was too young to do him any harm or even talk, so why kill him? He was a very smart kid, he said, too smart for his age. I had to make sure he was dead.

Defendant arrived in Washington, D.C. on July 18, 1983, the day after the murders were committed. He checked into the Annex Hotel. While there, he paid rent in advance for his room, giving the clerk five one hundred dollar bills. He also bought numerous items from a television store, which were loaded by a clerk into a car matching the description of that owned by his father. On July 31, 1983 defendant had an encounter with another guest at the Annex Hotel which led to the police being called. An officer ran a routine check on defendant and learned he was wanted in Louisiana for five counts of homicide. At the time of his arrest he had in his possession $1,100 cash and a hotel key. Following his arrest, the Washington police obtained a search warrant for his hotel room. Among the evidence recovered was one of the recently purchased television sets, with the names of the five victims written on the side. The vehicle driven by Chester and Grace Perry on their trip was recovered approximately one week later in a Washington, D.C. police impoundment lot where it had been towed for being parked in a no parking zone.

Following his transport back to Louisiana defendant was indicted on five counts of first degree murder. Defendant initially entered the dual plea of "not guilty and not guilty by reason of insanity" to each charge. A sanity hearing was held to determine his competency to stand trial, and the judge ordered he be sent to Feliciana Forensic Facility for further psychiatric evaluation. Subsequent to his return from this evaluation, another sanity hearing was held. At the close of this hearing defendant was allowed to withdraw his dual plea and enter the single plea of "not guilty," against the advice of counsel.

The issue of defendant's sanity is material to assignment of errors one and three, and is also relevant in the determination of whether or not defendant should have been permitted to withdraw the dual plea initially entered and replace it with a plea of "not guilty." Even though not included in the assignment of errors, we address the finding of the sanity commission hearings and the withdrawal of the dual plea because of their overall importance and effect on other assigned errors, and because we deem it imperative to afford a defendant assessed the death penalty a review of all issues raised in his behalf regardless of whether formally asserted.

DETERMINATION OF COMPETENCY

Defendant was the subject of two sanity commission hearings, the first on September 26, 1983 and the second on March 1, 1985. The first commission was composed of Dr. Louis E. Shirley, Jr., a general practitioner with some capacity to treat psychiatric disorders, and Dr. Young Hee Kang, a general practitioner who completed a residency in psychiatry. After brief interviews with the defendant in the parish jail on September 26, 1983, both were of the opinion he needed further psychiatric evaluation. They summarized their findings:

> We find that he has a long history of paranoid schizophrenia and at this time is not in complete contact with reality and

may be dangerous to himself and others. We were not able to ascertain his mental state at the time of the alleged offense(s). We feel that he needs complete psychiatric evaluation and therapy at this time.

As a result of this hearing the defendant was sent to the Feliciana Forensic Facility, for evaluation and treatment. The record does not reflect when the defendant was returned to Jefferson Davis Parish, but defendant was apparently returned in March of 1984.

Upon motion of the State, the second sanity commission was appointed. This commission was composed of the same two physicians who were on the first commission, plus an additional physician who specializes in psychiatry, Dr. Aretta J. Rathmell.

At this second commission hearing, the three physicians unanimously agreed defendant was mentally competent and could assist his counsel in his defense. The trial court agreed, finding the evidence clear, and ruled accordingly.

[1] It is fundamental to our adversary system of justice that a defendant who lacks the capacity to understand the proceedings against him or to assist counsel in preparing a defense may not be subjected to trial. La.C.Cr.P. art. 641; *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). This Court in *State v. Bennett*, 345 So.2d 1129 (La.1977), set forth the appropriate considerations which a trial judge must use in the determination of competency:

> Appropriate considerations in determining whether the accused is fully aware of the nature of the proceedings include: whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction. Facts to consider in determining an accused's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Bennett*, supra, at 1138.

It appears the examining physicians and court abided by these criteria. Dr. Rathmell, the psychiatrist, and the first of the three doctors on the commission to testify at the second sanity commission hearing, in particular paid attention to the criteria. She read from her report, which followed almost verbatim the factors set forth in *Bennett*, and concluded defendant was presently sane and able to proceed with trial. Her opinion was based on two ninety minute interviews with defendant, and evaluation of medical reports from the two State hospitals to which defendant had been committed. Some of these reports came from Feliciana Forensic Facility, and were the result of months of observation. She noted the records compiled by the psychiatrists at Central State Hospital at Pineville diagnosed the accused as having a paranoid illness, which she indicated is more of a character trait or state of mind than is the more serious schizophrenic illness. She characterized schizophrenia as a more incapacitating thinking disorder. She believed defendant has periodically had severe psychiatric problems, but agreed with the earlier psychiatric diagnoses from Central State Hospital. She found at the time of defendant's examination by her he was in remission of a paranoid illness. Though on cross-examination Dr. Rathmell admitted other hospital records characterized the defendant as having paranoid schizophrenia, she noted those words always appeared with the signature of non-medical personnel. Dr. Rathmell noted no psychiatrist had ever documented the diagnosis of acute paranoid schizophrenia.

Dr. Shirley did not include in his opinion of defendant's mental condition as many of the criteria from *Bennett* as did Dr. Rathmell. However, he still addressed several of them in his testimony during examination. Dr. Shirley was firm in his conclusion the defendant seemed to be able to assist his counsel at trial, to be aware of the charges against him, and to be able to help in his defense. Dr. Kang, like Dr. Shirley, also did not include all of the criteria, but was of the opinion he could assist his counsel, understand the trial he was facing, and understand the consequences of possible conviction.

It should be noted additional support for the finding of competency is evident in the testimony of Dr. Theresa Jiminez, who testified during the penalty phase of defendant's trial. Dr. Jiminez is a certified psychiatrist, and was employed as clinical director at Feliciana Forensic Facility during the time defendant was being evaluated there under court order. Her duties included determining whether or not patients were mentally ill. She testified there are two types of mental illnesses: schizophrenia, which is a major mental illness, and those illnesses that constitute personality disorders. She classified defendant as having a personality disorder, of an anti-social type. She also indicated defendant is smart enough to act in a crazy manner if he feels he needs to do so. Further, she stated if a person is suffering acutely from a major mental illness, as opposed to a personality disorder, he would not have the capacity to plan and reason out his acts as was necessary for the crimes involved here. He would not be able to think logically, lay in wait for someone to come home, plan a murder, hide evidence, or know to flee from town.

A comparison of the length of examinations and credentials of Drs. Rathmell and Jiminez, as opposed to Drs. Shirley and Kang, is significant in weighing the opinions of each as to credibility. Drs. Shirley and Kang had both earlier diagnosed defendant as being paranoid schizophrenic. Dr. Rathmell spent approximately three times as long with defendant as did Drs. Shirley and Kang; Dr. Jiminez had the benefit of months of her own personal observation and reports of other staffers while the accused was a patient from October 1983 to March 1984. Both Drs. Rathmell and Jiminez are psychiatrists; neither Dr. Shirley or Dr. Kang is a psychiatrist. Dr. Shirley himself, during his testimony, indicated a willingness to defer to the greater experience and expertise of Dr. Rathmell.

[2] The defendant has the burden of establishing incapacity, because Louisiana law presumes the defendant is sane and responsible for his actions. La.R.S. 15:432. The defense must prove by a clear preponderance of the evidence the defendant is incompetent to stand trial as a result of a mental disease or defect. La.C.Cr.P. art. 641; *State v. Machon*, 410 So.2d 1065 (La. 1982). While a court is permitted to receive the aid of expert medical testimony on the issue, the ultimate decision of competency is the court's alone. La.C.Cr.P. art. 647; *State v. Rogers*, 419 So.2d 840 (La.1982). A trial court's determination of the mental capacity of a defendant is entitled to great weight, and his ruling will not be disturbed in the absence of manifest error. *State v. Morris*, 340 So.2d 195 (La. 1976).

[3] The weight of the evidence supports the trial court's determination of competency. The expert witnesses in the sanity commission hearing at which competency was found were examined thoroughly by both prosecution and defense. The three examining physicians were unanimous in their conclusion the defendant was able to proceed with trial. It is true there were some diagnoses of defendant as having paranoid schizophrenia, made by non-psy-

chiatrists. However, the weight of the evidence, in terms of both the duration of the interviews and expertise, supports the finding of either a personality disorder or paranoid illness, as opposed to the more disabling thinking disorder of schizophrenia. In light of this evaluation of expert testimony, we cannot find the trial court's determination of defendant's competency to be clearly erroneous.

WITHDRAWAL OF DUAL PLEA

The issue of withdrawal by defendant of the dual plea was considered by the trial judge immediately following the sanity hearing. Though the change of plea was not included in the assignment of errors, we address this issue because of its importance in assuring complete review and because it was raised during oral argument.

During the interval between the appointment of the second sanity commission and the hearing on March 1, 1985, the trial court received correspondence from the defendant. In this correspondence the defendant informed the court of his desire to withdraw his dual plea of "not guilty and not guilty by reason of insanity" and enter the single plea of "not guilty." The attorneys were notified of defendant's wish and of the court's intention to consider this request if the defendant was found mentally competent at the sanity hearing.

[4] Following the finding of competency, the defendant was informed the court was aware of his desire to withdraw his dual plea on all five counts and replace it with the single plea. He told the court emphatically he wanted to change the plea. The trial judge questioned the defendant about his education, learning he had completed 13 college hours of credit in general studies. The judge clarified and explained thoroughly what the plea of "not guilty and not guilty by reason of insanity" meant. Defendant related he and his attorneys had spoken at length about the change in plea, and in response to the judge's question, he again expressed his desire to withdraw the dual plea. Out of an abundance of caution, the judge called a recess for the express purpose of providing defendant a final consultation with his attorneys, and specifically instructed defendant to listen to his attorneys. After a forty minute recess, the defendant had not changed his mind and still wanted to change his plea. Over the objection of his counsel, the court permitted defendant to withdraw his dual plea and enter a plea of "not guilty," relying on the holding of *State v. Clark*, 305 So.2d 457 (La.1974). The relevant portion of *Clark, supra*, provides as follows:

> This Court cannot approve the trial court's action in requiring the defendant to maintain such an untenable position when he desires to withdraw the insanity portion of the dual plea unless there is some overriding rationale for refusing a defense request to withdraw such a plea. The reason for La.C.Cr.P. art. 561's specific time limits within which a defendant may of right change a simple "not guilty" plea to the dual insanity plea is to give the State adequate notice of defendant's intention to advance the insanity defense and adequate time to prepare in the face of such a defense. See Official Revision Comment to La.C.Cr.P. art. 561. No such rationale is applicable in the reverse situation. When defendant seeks to withdraw the insanity portion of a dual plea and stand on a simple "not guilty" plea, no prejudice to the prosecution results. However, denial of a request for permission to withdraw the dual plea results in substantial prejudice to the defendant in a criminal prosecution. The defendant may withdraw the dual plea and substitute the single plea of "not guilty" at any time prior to the presentment of the indictment and defendant's responsive plea to the jury. *Clark*, at 463.

It is true the instant case is distinguishable from *Clark*, as it does not appear in *Clark* the plea was withdrawn over counsel's objection. However, this Court has recently dealt with this specific issue in the capital case of *State v. Lowenfield*, 495 So.2d 1245 (La.1985), where the accused





also wished to withdraw his plea of insanity against his attorney's advice. The Court stated the following:

> It appears beyond argument that when a competent defendant wishes to plead not guilty rather than not guilty by reason of insanity, and clearly understands the consequences of his choice, then the counsel must acquiesce to the wishes of his competent client. The court had no choice but to allow the defendant to withdraw his pleas and in this we find no error.... *Lowenfield*, at p. 1252.

We consequently find the trial court ruling permitting defendant to withdraw his plea is correct.

ASSIGNMENT OF ERROR NO. ONE

Defendant's first assignment of error challenges the admissibility of a statement he made on September 15, 1983 to Herbert L. Durkes, Jr., a jailer at the Jefferson Davis Parish jail during the time defendant was incarcerated there. Defendant argues primarily his mental state at that time prevented him from giving a free and voluntary statement.

In the early morning hours of September 15, 1983, defendant informed Durkes he wanted to confess. Durkes told defendant he would call Detective Ervin Trahan or Chief Deputy Ted Gary to hear his confession, but defendant said he did not want to talk to them because they did not want to listen to him. Durkes therefore secured the presence of Robert Lee, the other jailer on duty, and of Daniel Peer, a trustee. Peer stood out of defendant's line of vision, along the wall beside the door to defendant's cell. Durkes and Lee squatted down so they could listen at the opening in the steel cell door through which food is placed into the cell. From that position they could see defendant's face and shoulders. Durkes read defendant his *Miranda* rights and asked if he understood them, to which defendant responded yes. He asked defendant if he wanted a lawyer present and defendant said he did not. Durkes listened as defendant confessed and subsequently went to his desk and wrote down the account. Lee and Peer read the written statement and agreed it matched what defendant had said. Durkes took the handwritten statement to a typist who then typed it.

Before the State can introduce what purports to be a confession, it must affirmatively show it was made freely and voluntarily, and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La.R.S. 15:451. In addition, if the statement was made during custodial interrogation, the State bears the burden of showing defendant received and waived his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Nelson*, 459 So.2d 510 (La.1984).

At both the hearing on the motion to suppress and at trial, Durkes indicated he did not promise anything to defendant, did not threaten or intimidate him, coerce him or place any physical or mental duress upon him. Durkes described defendant as alert during the giving of the statement and stated he had defendant's full attention. Defendant made eye contact with Durkes and was responsive.

Furthermore, the record clearly demonstrates Durkes read defendant his *Miranda* rights and defendant does not contend otherwise. Rather, defendant's attack on the admission of the confession focuses upon whether the statement was freely and voluntarily made, considering his mental condition at the time he gave it. He relies heavily on his having been diagnosed as paranoid schizophrenic a short time before giving the statement and was soon to be sent to Feliciana Forensic Facility. In order to assess the merit of this argument, it is necessary to review the testimony from the September 26, 1983 sanity commission hearing held shortly after the statement was given, as well as from the August 21, 1985 hearing on the motion to suppress where the statement was ruled admissible.

As earlier indicated, on September 26, 1983, Drs. Shirley and Kang examined defendant and testified at a sanity hearing

held that same day. They concluded he was paranoid schizophrenic, and we have previously disregarded this finding in favor of the diagnoses provided by the more experienced psychiatrists. However, while defendant contends the characterization of paranoid schizophrenia by Drs. Shirley and Kang should result in his statement being excluded, we find much in their testimony which supports a finding it was made freely and voluntarily.

Dr. Shirley stated he found defendant well-oriented to time and place, and very up-to-date on current events. The doctor characterized him as very aware of what was going on around him, but determined defendant did have some "flights of fancy" during the examination in which he lost contact with reality. These "flights of fancy" did not occur all the time and resulted when certain subjects were brought up by the use of trigger words.[1]

Dr. Kang, in her testimony, concurred in Dr. Shirley's finding of defendant's "flights of fancy" being triggered by certain topics. They both felt further evaluation was necessary, and neither could ascertain what his mental state was at the time the offense was committed due to defendant's lack of recall of that time period.

Both doctors also testified at the hearing on the motion to suppress held on August 21, 1985. They reiterated their earlier testimony concerning defendant's "flights of fancy" being triggered by certain words or subjects. Dr. Shirley also stated a person with paranoid schizophrenia would be in touch with reality much of the time. Dr. Kang supported this by stating defendant was "more or less" cognizant of what was going on around him until the trigger words were mentioned.

Defendant relies upon *State v. Glover*, 343 So.2d 118 (La.1977), for his contention that defendant's mental state precluded his confession from being free and voluntary. In *Glover, supra*, this Court ruled statements made by the defendant inadmissible because at the time he gave them it was probable he was actively psychotic and legally insane. It is true the defendant in *Glover*, like the defendant in this case, had been diagnosed as a paranoid schizophrenic. However, it should be noted Glover also was mentally retarded and suffered from organic brain damage.

Even were we to accept the characterization of the instant defendant as being paranoid schizophrenic, this should not automatically render his statements inadmissible. In *State v. West*, 408 So.2d 1302 (La.1982), this Court rejected defendant's argument that his paranoid schizophrenia made it impossible for him to give a voluntary statement, and ruled the admission of the challenged statements into evidence was not erroneous. The Court distinguished West's condition from that of Glover, noting in particular Glover's organic brain damage in addition to his mental illness, as well as the fact Glover received a very potent anti-psychotic drug.

[5] Defendant in this case appears to be more like West than Glover. He was not being medicated before he made the statement. There is no evidence he suffers from organic brain damage or is mentally retarded. To the contrary, when the trial judge questioned him in court to determine his understanding of the plea withdrawal issue, it was learned defendant had completed thirteen hours of college studies and left school because he fell behind. Drs. Shirley and Kang both stated defendant seemed in contact with reality until he heard the trigger words, and these words were not a part of the conversation between defendant and Durkes. The state-

1. As stated by Dr. Kang in the second sanity commission and the motion to suppress hearings, trigger words were used in examining the defendant to determine his reaction to subjects that had previously resulted in psychotic behavior on his part. This defendant reacts visibly to the words "Olivia Newton-John." The mention of those words has caused him, after previously exhibiting no psychotic manifestations during an interview, to behave in a deviant manner. He would start rambling, become aggressive and hostile, and talk endlessly. In this way he evidences his loss of touch with reality.





ment given does not indicate rambling or jumping from subject to subject. Durkes testified defendant was alert, responsive, made eye contact, and gave Durkes his full attention during the giving of the statement.

The determination of the admissibility of a confession is a question for the trial judge, and his conclusion will not be disturbed unless not supported by the record as a whole. *State v. Nuccio*, 454 So.2d 93 (La.1984). We conclude the trial judge did not err in ruling the statement was admissible. The evidence supports his finding defendant did not suffer from mental illness to the degree necessary to result in exclusion because of involuntariness. Thus, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. TWO

In this assignment of error defendant alleges the trial court erred in allowing the State to introduce the testimony of Zula Lyon regarding statements defendant made to her. He contends Mrs. Lyon served as an agent for the sheriff's office and, as such, *Miranda* warnings should have been given. Zula Lyon is the defendant's aunt and his mother's sister.

The statements complained of were given on two of the ten to twelve occasions defendant was visited by Mrs. Lyon in 1983. On September 16, 1983, he told his aunt he remembered the murders and had killed five people. He wrote the victims' names down on a piece of paper he had in his cell. He also told her his father had $3,000 in his wallet, which he took. He related he used pistols and shotguns to kill the victims, and disposed of the weapons and some luggage in a canal.

On September 30, 1983, as Mrs. Lyon was preparing to leave after a visit with defendant, he again told her he killed the people. He added the judge did not want him to plead guilty because the case was too serious. He said he was guilty and repeated he had killed the people.

It is evident from Mrs. Lyon's testimony she had motives in visiting defendant other than to solicit information for the sheriff. While she admitted she had asked defendant questions about the murders on some of her visits, she specifically stated she had not questioned him on September 16, 1983. The purpose of her visit on that date was to bring winter clothing to defendant in preparation for his transfer to the Feliciana Forensic Facility. She also expressly stated she had never been asked to question defendant.

Similarly, the reason for her visit on September 30, 1983 was to visit him one more time before defendant left for Feliciana Forensic Facility, to see what his state of mind was and to see if he was in need of anything. It is clear Mrs. Lyon did not question him on that date. According to her testimony, the statement on that date was volunteered by defendant as Mrs. Lyon was getting ready to leave.

Defendant alleges Mrs. Lyon received special treatment from the sheriff's office, implying this would not have been the case had she not been eliciting information with the intention of relaying it to the sheriff. While it is true on some of her visits to defendant Mrs. Lyon talked with him in the sheriff's office, her testimony also makes it clear she did on some occasions see him in his jail cell in solitary confinement. Also, although she admitted she talked with the deputies a number of times about the case, she maintained they never asked her what defendant had said to her.

From Mrs. Lyon's testimony, it does not appear she was acting on behalf of the sheriff's office when she visited defendant and talked with him about the crimes. In particular, it should be noted neither statement was the result of questioning by her and both statements were instead unsolicited, spontaneous confessions of guilt.

This Court has previously considered a similar situation in *State v. Loyd*, 425 So.2d 710 (La.1982). Loyd was given his *Miranda* rights and the defendant made incriminating statements after invoking his right to silence. These statements were elicited by defendant's mother who had

been called by a deputy for the express purpose of obtaining information from the defendant. She spoke with him once, did not receive adequate information, and later in the morning sought permission to talk with him again. The sheriff consented and asked her to try to extract information regarding the whereabouts of the missing child. After she talked with her son, a family friend also talked with him. Then defendant's mother had another conversation with him. Before this conversation the sheriff requested that she ask her son if he would talk with the deputies.

Loyd challenged the admissibility of incriminating statements made to his mother, asserting they were not admissible because they came after he had exercised his right to cut off questioning. The Court held otherwise, reasoning the questioning by defendant's mother occurred out of the officers' presence. It noted police efforts to elicit incriminating statements from him did not constitute custodial interrogation within the meaning of *Miranda*, unless a person realizes he is dealing with the police. The Court specifically stated the mother "was not a police officer or agent...." *Loyd* at 717. The Court continued with the following:

> Consequently, in the absence of any interplay between police custody and police interrogation, the mere fact that the defendant was in custody was not so intimidating, nor his mother's questioning so menacing, as to bring *Miranda* into play. *Loyd* at 717.

The Court in *Loyd* relied on its earlier decision in *State v. Rebstock*, 418 So.2d 1306 (La.1982), where the sixteen-year-old charged with commission of the crime challenged the admissibility of an inculpatory statement made to his father before being advised of his *Miranda* rights. The Court ruled the statement was admissible, despite the argument by defendant the father acted as an agent of the police and thus violated his constitutional rights. The Court said the father voluntarily undertook to question his son, and their brief conversation was not an extension of police interrogation. It noted the compulsion conceptualized in *Miranda* as resulting from interrogation was not present. Finding the defendant and his father had a short private conversation, out of the presence of the police, the Court ruled the defendant was not subjected to interrogation as defined in *Miranda*.

[6] After reviewing the circumstances under which the statements were given and the applicable case law, we find no error in their admission by the lower court. This is especially required after comparing the instant situation to the more compelling facts in *Loyd*, in which this Court refused to exclude the statements given by the defendant to his mother. We find Mrs. Lyon was not acting as an agent for the sheriff. She did not question him on the two dates he gave the unsolicited confessions. Both statements were made when no police were present, so they were not the product of custodial interrogations. We particularly note the first of the statements came the day after defendant had confessed to Durkes. Apparently defendant was simply ready to confess. We accordingly find no merit in this assignment.

## ASSIGNMENT OF ERROR NO. THREE

Defendant complains in his third assignment of error of yet another statement admitted into evidence against him. He made this statement while enroute to the Feliciana Forensic Facility.

Sheriff Dallas Cormier and Deputy Ervin Trahan transported defendant on this trip. Sheriff Cormier had invited defendant's counsel to accompany them, but counsel declined stating he was too busy. While enroute, defendant began spontaneously talking about the case. Neither the sheriff nor deputy questioned defendant or initiated conversation about the five counts against him. Rather Sheriff Cormier told defendant not to say anything because they did not want to talk about the case without his attorney present. Defendant nevertheless continued, on his own volition, to talk. Several times he asked Deputy Trahan if they had found the guns used in the homi-





cides. Trahan eventually replied they had not. Defendant then explained where the weapons could be found. During the trip defendant also spoke about his family members who had been killed, and wondered about the judge handling the case, inquiring as to whether he had sentenced anyone to the electric chair.

Defendant contends the statement regarding the location of the guns should not be admissible because the doctors had already diagnosed him as paranoid schizophrenic, referring the Court to his first assignment of error. As discussed above, we have earlier disregarded this testimony. However, even were we to agree with this medical conclusion, the diagnosing doctors testified defendant lost contact with reality when the trigger words, Olivia Newton-John, were used. Otherwise, defendant remained in contact with reality. We note Deputy Trahan testified those trigger words were not brought up during the trip to Feliciana.

[7] Nonetheless, the circumstances in which this statement was given differ from those of the statement challenged in the earlier assignment of error. Both the sheriff and deputy testified defendant talked throughout the entirety of the trip, and said he changed subjects frequently. This might suggest defendant's mental state was less stable than it was when he spoke with Durkes. However, in rebuttal to that possible conclusion is the fact defendant always returned to and primarily wanted to talk about the subject of the murders. He also did not change topics to the extent he would change them in mid-sentence. Sheriff Cormier testified defendant was awake and remained alert during the trip. These facts indicate to us defendant was in contact with reality during the trip and wanted to convey the information regarding the location of the guns to the sheriff and deputy. Moreover, the accuracy of the statements was borne out when the police recovered the guns from the drainage canal defendant had suggested they search. As the State argues in brief, this shows defendant was in touch with reality when he made the statements. We find the trial judge correct in ruling the statement should not be excluded because of defendant's mental condition.

[8] Defendant raises another objection to the admissibility of this statement, relying on La.R.S. 15:450. He argues the statement should not be admitted because it was only part of the conversation which took place during the trip to the Feliciana Forensic Facility. La.R.S. 15:450 mandates the following:

> Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.

In brief defendant objects in particular on the ground that admitting only part of the confession prevented him from showing the true state of defendant's mind, how defendant changed from topic to topic during the course of his statement and how defendant was or was not in touch with reality. He contends the only portion of the statement admitted was that part beneficial to the prosecution.

A reading of the transcript reveals defense counsel did not object to the statement on the basis of La.R.S. 15:450 during direct examination. It was not until defense counsel had cross-examined Deputy Trahan rather extensively that he objected. Under these circumstances, it appears objection came too late.

Furthermore, both defense counsel and the prosecution questioned Deputy Trahan thoroughly about defendant's conversation and did elicit information in addition to that concerning the location of the guns. Trahan indicated defendant "rattled on" about a number of subjects, including whether the trial judge had ever sent anyone to the electric chair and the fact he had thrown a strong box containing a check over a bridge while going to Baton Rouge.

Finally, even if the whole statement was not admitted into evidence, this Court has

treated a similar situation in *State v. Marmillion*, 339 So.2d 788 (La.1976). It found the following:

> Nevertheless, in the absence of proof to the contrary, the fact that the purported statement of the accused as testified to by the investigating officer does not consist of a verbatim reiteration of the conversation between them, due to the witness' inability to recall or other valid explanation, the rights of the accused under Section 450 are not violated. The law does not require the production of nonexistent portions of the confession or portions which cannot be recalled. *Marmillion, supra*, at 793.

We find this assignment seeking exclusion of defendant's statement during transport to be without merit.

ASSIGNMENT OF ERROR NO. FOUR

The defendant seeks by this assigned error to suppress all evidence seized at the two murder scenes on the day or days following discovery of the bodies. He contends the admission of this crime scene evidence violates his right and the public's right to be protected from warrantless searches and seizures.

There is no dispute the officers had a right to make warrantless entries of the two murder scenes on the reasonable belief persons within might be in need of immediate aid, to see if there were other victims and to determine if the perpetrator of the crimes was still on the premises. *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The sheriff's office secured both crime scenes until the next day and re-entered on July 20, 1983 to conduct an investigatory search, collecting evidence and removing items which required laboratory analysis. These subsequent searches of the murder scenes were warrantless although, as the State concedes, there was time to obtain a search warrant for the murder scenes. In fact a warrant was obtained to enter and search the trailer which the defendant occupied. Defendant had a privacy and proprietary interest in his deceased parent's house, he argues. Moreover, defendant argues the public has an interest in preventing the admission of evidence from an illegal search. (The argument of the public's right against warrantless search and seizure was raised in brief and oral argument, but no authority was given.)

Defendant relies upon *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), which he cites for one proposition: there is no murder scene exception, therefore, a warrantless search is not constitutionally acceptable simply because a homicide has recently occurred there. *Thompson v. Louisiana* overturned this Court's opinion, *State v. Thompson*, 448 So.2d 666 (La.1984), which held a warrantless search of defendant's home was valid when defendant had a diminished expectation of privacy in her home because she called for aid after murdering her husband, and because her daughter, called by her mother, let the police in on her apparent authority over the premises.

The U.S. Supreme Court held the opinion was indistinguishable from and conflicting with *Mincey v. Arizona, supra*. Thompson was tried for the murder of her husband. Deputies were summoned to the house by defendant's daughter, who reported a homicide. The daughter said the defendant shot her husband, attempted suicide by ingesting pills, but then called her daughter, told her of her acts and asked for help. The daughter called police and went to her parents' house, admitting the deputies. The deputies found the defendant unconscious and her husband dead of a gunshot wound. Defendant was transported to the hospital. Homicide investigators arrived thirty-five minutes later, entered the premises and searched the scene for two hours, locating incriminating evidence of the murder and attempted suicide.

The Supreme Court held the two-hour general search of defendant's house was a significant intrusion on her privacy and was invalid without a warrant. Discovery of the evidence did not occur in the initial sweep of the house for victims or the killer,





or in the plain view exception in the initial entry. Defendant's call for help did not convert her home into a public place where no warrant is required. The Supreme Court in *Thompson* reaffirmed the rule that "searches, conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions." Consent is one of the exceptions to the warrant requirement.

The State contends police lawfully entered the murder scene at 639 Louisiana Street upon the consent of Paul "Blue" Perry and Edward Ashford. Three men resided at this house: Paul "Blue" Perry and the victims Randall Perry and Bryan LeBlanc. Ashford was the caretaker for this house and his stepson, Bryan LeBlanc, lived there. Ashford's wife was concerned about Bryan, a diabetic, and Ashford went to the house about 5 P.M. on July 19, 1983, at her urging. He found the doors locked and could not get an answer from within. The front door fell off its hinges as he knocked on it. He walked in and discovered the bodies. After Ashford sought police help, he met the police chief at the house and told him to go inside. After other officers arrived, two officers walked to the Perry residence two doors away and saw on the carport floor pieces of flesh, skull and bone marrow. They then entered the second murder scene, at 810 Seventh Street.

The State argues it had the initial consent of Ashford, the caretaker, to enter 639 Louisiana Street. The only surviving resident of the house at 639 Louisiana was Paul "Blue" Perry, who was working on an offshore oil rig at the time of the murders. Chief Deputy Ted Gary said he spoke to "Blue" Perry and obtained consent for the continuing searches of his house. Perry was returned to Lake Arthur after the bodies were discovered. Gary recalled talking to Blue Perry before re-entering the house. In addition, the State argues, Ashford was sufficiently related to the house to give consent. Ashford was the caretaker, had a key to the house, and had ongoing permission to enter the house whenever he deemed it necessary.

[9] There is no showing that defendant possessed any privacy interest at 639 Louisiana Street. He did not reside there and had no property there. Neither Ashford nor Blue Perry withdrew the consents to search the house. Both had sufficient interest in the house to give valid consent to enter for all the searches. We uphold the warrantless searches of 639 Louisiana Street as lawful consent searches.

Defendant also objects to the evidence seized at 810 Seventh Street, where his parents lived. The bodies of his parents and two-year-old Anthony Bonin were found inside, when deputies entered after finding the two bodies at 639 Louisiana Street and discovering pieces of skull, flesh and bone marrow in the carport outside 810 Seventh Street. Again, the initial entry was unequivocally lawful, since officers were searching for victims or suspects.

[10] Michael Owen Perry did not reside at 810 Seventh Street at the time of the murders. He lived in a trailer behind his parents' home. There is ample evidence that defendant was not permitted in his parents' home without their permission. The doors were kept locked and Michael Owen Perry was not given a key. He had to knock to be admitted. There was no showing defendant had any of his property within his parents' home, or that he used it as an extension of his residence. Officers found evidence of forced entry into the house. Defendant's statement to the jailer admitted he broke into the house to wait for his parents. There is no proof defendant had a privacy interest at 810 Seventh Street. To the contrary, he could not enter the house of his own will and he had no property inside. This case is distinguishable from *Mincey* and *Thompson*, where in both cases the defendant's home was searched. There was no living person who had a privacy interest in the house at 810 Seventh Street. Therefore, the entries of

the house were not in violation of anyone's privacy interest.

The Louisiana Constitution does not limit standing to challenge a search to those who live in the premises and thus have a reasonable expectation of privacy in it. La. Const. Art. I, § 5 provides in pertinent part: "*Any person* adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court." (Emphasis added.) The first part of the section states that every person has the right to "be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy." Thus, it seems that there must be an invasion of *someone's* rights to privacy before there can be an unreasonable search.

It is well settled that the Fourth Amendment to the United States Constitution protects people, not places. It is the individual's reasonable expectation of privacy that our society values and the constitution protects. *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

*State v. Hines*, 323 So.2d 449, 450 (La. 1975).

Michael Owen Perry was a resident of the trailer and the search of that residence was with a warrant. The evidence seized from the two murder scenes was properly admitted into evidence. There is no merit in this assignment.

ASSIGNMENT OF ERROR NO. FIVE

Defendant argues the trial court erred in allowing the State to present to the jurors numerous color photographs of the five homicide victims. He contends the photographs were not necessary for any probative purpose and inflamed the jury, overwhelming their reason. (We will discuss later in this opinion whether the use of the photographs introduced an arbitrary factor into the jury's sentencing recommendation.) The photographs were unnecessary, he argues, because the pathologist who performed the autopsies testified to the cause of death, the location and number of gunshot wounds, the type of weapon used and the approximate distance of the victim from the gun when fired. Sheriff's deputies testified in great detail to the location of the victims in the house, the location of gunshot holes in the walls, the splatter of blood, tissue and brains; the deputies used drawings, cut outs and body figures to illustrate their testimony.

Defendant objected timely at trial to the admission of the photographs into evidence. The judge admitted the photographs in evidence, commenting, "I think the probative value will outweigh whatever prejudicial effect could happen. I realize, of course, that they are unpleasant pictures to look at but that's one of the situations that we, as well as jurors, have to face in a case of this kind.... It corroborates everything this doctor (the pathologist) was saying in the cause and effect and the other aspects, and I think that the corroboration in this matter is very important, so we're going to admit them."

The State introduced a total of 170 color photographs in evidence. The photos show the interior and exterior of the two houses, the condition of the house as it was found and photos of the houses after the victims were removed. There are eight photos taken at the pathologist's directions before he began autopsies. The total also includes four portraits of the victims as they appeared in life. The great majority of the photographs are a painstaking photographic tour through the two houses, with officers taking pictures of all conceivably relevant evidence. Of the 158 photos taken at the two murder scenes, 23 show one or more of the victims.

The photographs of the remains of five murdered persons can not be less than gruesome. The pictures are unpleasant. All the victims were struck in the head with blasts from a shotgun fired at close range, sometimes at point-blank range. Many of the photographs show the destruction of the skulls, particularly the photographs taken prior to autopsy. No amount of testimony or the use of diagrams can

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[11] The defendant cannot force the State to use drawings or other evidence instead of photographs. The defendant cannot deprive the State of the moral force of its case by offering to stipulate to what is shown in photographs. *State v. Watson*, 449 So.2d 1321 (La.1984); *State v. Lindsey*, 404 So.2d 466 (La.1981). The court's admission of allegedly gruesome photographs will be overturned on appeal only if the prejudicial effect of the photographs clearly outweighs their probative value. *State v. Watson*, supra; *State v. Boyer*, 406 So.2d 143 (La.1981).

[12] The photographs of the murder scenes are clearly relevant, corroborating the testimony of the State's witnesses as to the location of the bodies, the apparent sequence the murders occurred in and the multiple gunshot wounds to at least two of the victims.

This Court will not find the photographic evidence was admitted in error unless the photographs are so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. *State v. Watson*, supra; *State v. Ward*, 483 So.2d 578 (La.1986).

The photographic evidence was admitted during the trial's guilt phase following testimony of the investigating officers and the pathologist on Friday, October 25, and Saturday, October 26, 1985, respectively. The court recessed for the weekend following introduction of the last of the photographs. Trial resumed Monday, October 28, 1985. Guilty verdicts were returned October 31, 1985, and the jury deliberated and decided on the death penalty the same date. The emotional impact of the photographs had time to dissipate before the State concluded its case and the jury reached the deliberative stage. Without doubt, the primary effect of having viewed the photographs was to impress upon the individual juror the seriousness of the task to which he or she was sworn. The State was entitled to no less.

This Court, in *State v. Lowenfield*, 495 So.2d 1245 (La.1985), considered the admissibility of photographs of five murder victims. Lowenfield was convicted of murdering four adults and one child in his former girlfriend's house. All the victims were shot in the head and all suffered multiple gunshot wounds. The weapons used were a .38 caliber pistol and a .22 caliber rifle. This court found the prejudicial effect of the pictures did not outweigh their probative value. The photographs of murder victims are admissible to prove corpus delicti, to identify the victims, to corroborate the cause of death and to show location, placement and severity of wounds. One photograph of each victim was put into evidence.

We find the photographic evidence was relevant and probative in proving the State's case against Michael Owen Perry. They proved corpus delicti, helped identify the victims, corroborated the cause of death, the types of weapons used and the location and severity of the wounds. We find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. SIX

[13] Defendant's sixth and final assignment of error contends the trial judge erred when he failed to grant defendant's motion for a mistrial following a state witness's oblique reference to the defendant's theft of a radio. Defendant argues this evidence of other crimes prejudiced the jury against him and led to his conviction on five counts of first degree murder.

We find no merit in this assignment of error. This Court has addressed similar situations and found other crimes evidence insignificant when weighed against the offense for which the defendant was on trial. *State v. Parker*, 421 So.2d 834 (La.1982), *cert. den.*, 460 U.S. 1044, 103 S.Ct. 1443, 75 L.Ed.2d 799; *State v. Abercrombie*, 375 So.2d 1170 (La.1979), *cert. den.*, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787. In *Parker, supra*, the defendant was on trial for two counts of first degree murder in connection with the armed robbery of a restaurant. Defendant's arrest came 17

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days after the robbery-murders, following another armed robbery, when police chased the car defendant occupied. The prosecutor carefully deleted reference to the second armed robbery but explained the apprehension of defendant as the consequence of a traffic violation. This Court said: "The evidence of misdemeanor traffic violations was hardly evidence of other crimes of any significance and did not portray him prejudicially as a 'bad man' capable of murder." *Parker* at 840. The same thing, in the context of multiple murders, might reasonably be said of the theft of a radio.

In *Abercrombie, supra*, there was evidence of a minor vandalism, but the Court said such evidence would not "inflame a jury to the point that it would be influenced to convict an accused of first degree murder." *Abercrombie* at 1176.

The reference to Perry's alleged theft occurred in the explanation of his apprehension in Washington, D.C. The murders occurred in Lake Arthur, Louisiana, around noon on July 17, 1983. Perry arrived in Washington, D.C. in late evening on July 18, 1983. The bodies were discovered the next day. Perry was arrested July 30, 1983. He came to the attention of Washington police after a person checking into a Washington hotel complained Perry walked off with a radio belonging to the hotel guest. The Washington policeman testified he was merely running a routine check on the man involved in the theft complaint when he was informed Perry was wanted in Louisiana for five murders. The policeman had not yet arrested Perry for theft.

An explanation of the Washington arrest was necessary to lay the foundation for introduction of evidence found in Perry's Washington hotel room, and the discovery of Perry's parents' automobile in Washington. A television set recovered from the Washington hotel room was found with the names of all five victims marked on the side of the set. The mention of Perry's alleged theft of the radio came as the prosecutor questioned Washington patrolman James Young about how he came into contact with Perry. Young said Perry and the complainant were disputing the ownership of a radio. Defendant objected timely.

The defendant is correct that the State may not introduce evidence of other crimes without giving notice that it intends to do so. *State v. Prieur*, 277 So.2d 126 (La. 1973). The State replies it never intended to introduce evidence of the theft of the radio and carefully avoided saying theft. In fact, the prosecutor replies, the defendant's counsel was the first person to categorize the encounter as a complaint of a theft.

We find no merit in this assignment. The evidence of the theft of a radio pales in significance to the five counts of first degree murder and would not portray defendant as a "bad man" capable of murder.

## CAPITAL SENTENCE REVIEW

This Court reviews every death sentence to determine if the penalty is excessive. La.C.Cr.P. art. 905.9 and Louisiana Supreme Court Rule 28. The Court is required to determine:

(a) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) Whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

## PASSION, PREJUDICE AND ARBITRARY FACTORS

The jury's conviction of Perry for first degree murder on all five counts was supported by the jury's finding of two aggravating circumstances on each count: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious or cruel manner.

[14] We have previously discussed, in Assignment of Error Number Five, the

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State's use of multiple color photographs of the victims, and the effect of the photographs during the guilt stage. We now decide if the photographs introduced an arbitrary factor into the jury's recommendation of the death penalty.

The photographs were introduced in the guilt phase, and were not used in the sentencing phase to arouse the jurors' hostility toward the defendant. In the context of a case with substantial proof of guilt for five unprovoked murders a death penalty recommendation is not surprising. It is difficult to believe the photographs pushed the jury toward a recommendation of death for this mass murder.

The State contended the murders were committed in an especially heinous, atrocious or cruel manner. To prove this, the State introduced, inter alia, photographs of the victims.

The use of evidence to prove a statutorily enumerated circumstance in support of the death penalty, although it may prejudice the defendant's interests, does not introduce an arbitrary or prejudicial factor sufficient to require the penalty be set aside. We find the evidence of this alleged aggravating circumstance did not constitute an arbitrary factor in the proceedings.

[15] The defendant contends further the jury was influenced by an arbitrary factor when the prosecutor misstated the law during closing argument of the sentencing phase. We find the misstatement does not present reversible error. The prosecutor spoke only in rebuttal of defense counsel's closing argument, but during that rebuttal, the prosecutor said, "The law says any person that's convicted of a first degree murder shall be sentenced to death."

The Court will not reverse on the basis of an improper comment during closing argument unless the Court is convinced the comment influenced the jury and contributed to the verdict. *State v. Bates*, 495 So.2d 1262 (La.1986); *State v. Ford*, 489 So.2d 1250 (La.1986). There was no defense objection to this misstatement of the law. The misstatement was overcome by the judge's instructions to the jury. The court correctly stated the law requires a unanimous finding of an aggravating circumstance and requires the weighing of any mitigating circumstances prior to the jury's decision to consider the death penalty. The judge's charge in effect informed the jury a person found guilty of first degree murder does not automatically receive the death sentence.

## MITIGATING CIRCUMSTANCES

[16] The defense argues the jury ignored the mitigating circumstances of defendant's alleged mental disorders. The defense counsel used its closing argument at sentencing to focus on defendant's mental condition. Counsel asked the jurors to consider defendant's appearance, mannerisms and conduct during the eight-day trial. Defendant's counsel said the defendant was not like normal people, that he had a mental disorder which caused him to commit a vicious crime, which normal people abhor. Three doctors had testified the defendant suffers from a mental disorder, the jury was reminded. The prosecutor's rebuttal said murderers are not ordinary people: "That's why they do what they do." He said the physicians who believed defendant was sane observed him for five months at a mental institution. Through both the defense counsel's argument and the court's instructions to the jury, the jurors were reminded they had to consider mitigating circumstances.

Defense counsel argues the mitigating circumstances were apparently overlooked by the jury. We find the conflicting medical testimony on defendant's mental condition was provided to the jury and the jurors chose to believe the State's experts, that the defendant did not suffer from a mental disorder so overwhelming that he was insane or unable to control or understand his actions.

## STATUTORY AGGRAVATING CIRCUMSTANCES

[17] The jury found the evidence supported the existence of two aggravating

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circumstances: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious, or cruel manner.

The evidence fully supports the aggravating circumstance: defendant knowingly created a risk of death or great bodily harm to more than one person. He killed two young men at 639 Louisiana Street within seconds. Defendant's parents and his two-year-old nephew were gunned down as they entered their home. He not only created a risk of death to more than one person at each crime scene but converted the risk into accomplished actuality. The random firing of weapons, as shown by the physical evidence, cannot be less than a risk of death to the multiple persons present at the scenes.

The jury's finding that the murders were committed in an especially heinous, atrocious or cruel manner was previously discussed in the consideration of arbitrary factors in sentencing. It is unnecessary that we consider the subject matter in the context of statutory aggravating circumstances. Only one aggravating circumstance need be found for the imposition of the death penalty. La.C.Cr.P. art. 905.3; *State v. Bates*, supra; *State v. Byrne*, 483 So.2d 564 (La.1986); *State v. Rault*, 445 So.2d 1203 (La.1984). Since we have determined the jury was correct in finding the offender created a risk of death or great bodily harm to more than one person, the death penalty is validated.

## PROPORTIONALITY OF THE SENTENCE

[18] The Court is required to weigh the sentence of death against the particular defendant and the offense(s) of which he is found guilty.

Michael Owen Perry was 28 when he committed these five murders. He lived in a small trailer behind his parents' home. He was unemployed, despite having graduated from high school, then attending one university briefly and later completing thirteen hours of college credit at LSU–Eunice. His work history was brief. He either resigned or was fired from his jobs. His uncle said the defendant stated he would not work because his parents had to support him.

Perry was one of three children. His brother died in an oil rig accident. Susan, his sister, has been committed to Central Louisiana State Hospital on several occasions. Perry's history of emotional or mental disorders dates to 1979, when his parents asked he be examined by psychiatrists at the University of Texas Medical Branch Hospital at Galveston. There is no evidence he was hospitalized then. In March 1981, his parents obtained his committment to Central State Hospital at Pineville. He was discharged on May 22, 1981 and referred to a community mental health clinic. On September 11, 1981, he was readmitted to the hospital at Pineville, but he walked away the same day and returned home, where his parents apparently allowed him to stay.

The reports of mental health professionals and general practitioners who examined him subsequent to the homicides has been set forth previously in great detail, and we will not reiterate that evidence. We note only the jury apparently chose to believe the state's expert witnesses and their opinion that the defendant's mental problems did not rise to the level of insanity. Even the physicians who testified for the defense said Michael Owen Perry was smart enough to act as if he were insane when it might benefit him. They also said Perry could conform his behavior to the norm most of the time.

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for





his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

We must also weigh this death sentence against the death sentences imposed in other cases in the jurisdiction in which this case was tried. *State v. Ford*, supra. If the recommended sentence is inconsistent with sentences imposed in similar cases, an inference of arbitrariness arises. *State v. Glass*, 455 So.2d 659 (La.1984).

Although the homicides occurred in Jefferson Davis Parish, the trial was moved to East Baton Rouge Parish after the court experienced initial difficulty in selecting a jury. Since 1978, there have been five murder trials in East Baton Rouge Parish where the jury recommended the death penalty. All those cases involved the death of one victim. One case was the rape and murder of an eleven-year-old child. The other four cases were murders committed during an armed robbery.

In *State v. Williams*, 392 So.2d 619 (La. 1980), defendant James C. Williams was convicted of killing a service station owner during an armed robbery. The case was remanded by this Court for the judge's failure to instruct the jury that lack of a unanimous sentence recommendation would result in a sentence of life imprisonment. After remand, defendant received a life sentence.

Robert Wayne Williams was executed for the murder of a supermarket security guard during a holdup. *State v. Williams*, 383 So.2d 369 (La.1980), 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828. The victim was shot in the face with a shotgun.

Colin Clark was convicted of a murder-armed robbery and this court affirmed his conviction and death sentence, *State v. Clark*, 387 So.2d 1124 (La.1980). A federal court later reversed the conviction and the sentence. *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir.1982). Clark subsequently entered a guilty plea to first degree murder without capital punishment.

The conviction and death sentence of Andrew Lee Jones for the rape-murder of an eleven-year-old child was affirmed by this Court in *State v. Jones*, 474 So.2d 919 (La.1985), *cert. den.*, — U.S. —, 106 S.Ct. 2906, 90 L.Ed.2d 993.

Jeffrey C. Clark killed his victim during an armed robbery. His conviction and death sentence were affirmed. *State v. Clark*, 492 So.2d 862 (La.1986).

None of these cases involves multiple victims. In Perry's case, the State argued the murders were committed during the perpetration of an aggravated burglary of the two houses and the armed robbery of Perry's parents. The jury did not return with a verdict agreeing with the state's argument on those circumstances.

In a case most similar to this one, this Court affirmed the death sentences imposed on Leslie Lowenfield for three counts of first degree murder. He was also convicted in Jefferson Parish of two counts of manslaughter. *State v. Lowenfield*, supra. Lowenfield killed his former girlfriend after she spurned him. He also killed three other members of her family and a neighbor who ran into the house when he heard gunshots. The psychiatrists who examined Lowenfield found him to be "angry, primitive, paranoid, and narcissistic." Lowenfield, unlike Perry, did not have a history of treatment in mental hospitals.

Defendant did kill all five victims in their homes. In *State v. Williams*, 490 So.2d 255 (La.1986), this Court found a review of death cases state-wide showed juries "often find death sentences appropriate where an innocent victim was murdered inside the sanctuary of his or her own home." *Williams*, supra at 264.

The death sentences for five offenses of first degree murder is not disproportionate to other cases in East Baton Rouge Parish where the death penalty was recommended.

## SANITY DETERMINATION PRIOR TO EXECUTION

[19] The State of Louisiana will not execute one who has become insane subse-

quent to his conviction of a capital crime. *State v. Allen*, 15 So.2d 870 (La.1943). No state imposes the death penalty on the insane. *Ford v. Wainwright*, — U.S. —, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. Counsel for the defendant may apply to the trial court for appointment of a sanity commission to make such a determination. Indeed, the allegation of mental incapacity may be raised by the court or the prosecutor. La.C.Cr.P. art. 642.

If the defendant seeks a sanity commission prior to execution, he bears the burden of providing the trial court with a reasonable ground to believe he is presently insane. *State v. Allen*, supra; La.C.Cr.P. art. 642; *State v. Lowenfield*, supra. Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution.

We have discussed extensively Perry's mental capacity to proceed despite his withdrawal of the plea of "not guilty and not guilty by reason of insanity." We have determined the defendant was capable of proceeding at trial. A similar review might be in order prior to execution. We stress that the determination of defendant's sanity is for the trial judge, not a sanity commission alone. *State v. Rogers*, supra.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes except that this judgment shall not serve as a condition precedent to execution as provided by La.R.S. 15:567 until

(a) defendant fails to petition the United States Supreme Court timely for certiorari,

(b) that court denies his petition for certiorari,

(c) having filed for and been denied certiorari defendant fails to petition the United States Supreme Court timely under their prevailing Rules for rehearing of denial of certiorari, or

(d) that court denies his application for rehearing. CONVICTION AND SENTENCE AFFIRMED.

**STATE ex rel. Curtis R. HINTON**

**v.**

**STATE of Louisiana.**

**No. 87-KH-0218.**

Supreme Court of Louisiana.

Feb. 9, 1987.

In re: Hinton, Curtis R.; Applying for Remedial Writ; Parish of St. Mary 16th Judicial District Court Div. "E" Number 119,018.

ORDER

Writ granted. District court is ordered to provide relator access to the transcript of the trial court proceedings in case number 119,018, 16th Judicial District Court, Parish of St. Mary, for the purpose of preparing a brief in support of his writ application pending in this Court.

**Robert A. BARNETT**

**v.**

**Shirley Lee, Wife of and Tang Ching LEE, ABC Insurance Company, Royal China Inc., DEF Insurance Company, Royal Place Inc., XYZ Insurance Company.**

**No. 87-C-0138.**

Supreme Court of Louisiana.

Feb. 20, 1987.

In re Lee, Shirley; Lee, Tang Ching; ABC Insurance Co.; Royal China Inc.;

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DEF Insurance Co.; Insurance Co.; Appl
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peal, Fifth Circuit,
Parish of Jefferson
Court Div. "I" Num

Prior report: 497
1986)

Writ granted.
New trial ordered.
judgment in the dis
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DIXON, C.J., and
COLE, JJ., dissent

DIXON, C.J., is o
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**STATE of**

**Shelby**

**No. 86-**

Supreme Cour

Feb. 2

Reconsider
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In re Arabie, Shell
of Certiorari and/or
of Appeal, First Cir
0087, KA-86-0088;
Rouge 19th Judicial
Number 08-85-314,

Prior report: La.

Denied.

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-5120

ORIGINAL

MICHAEL OWEN PERRY,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF RESPONDENT,
THE STATE OF LOUISIANA,
IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.
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STATE OF LOUISIANA

RENE I. SALOMON
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ISSUES PRESENTED

I. May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

II. Assuming that: (1) competency to be executed may be medically achieved and maintained without the prisoner's consent, and (2) the condemned inmate has a constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to treatment?

SUMMARY OF THE ARGUMENT

The State of Louisiana argues that this Honorable Court in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986) implicitly recognized that competency to be executed could be achieved and maintained through the administration of antipsychotic medication. While the Eighth Amendment under Ford prohibits the execution of the insane, post-conviction insanity was defined [as a condemned inmate who was unaware of his impending execution and the reason for it] by Justice Powell in his concurring opinion. Competency is the sole inquiry; how that competency is achieved and maintained is not a factor. Medication can help assure the inmate that he will be aware of his impending death and the reason for it. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

The administration of the antipsychotic drug Haldol to the petitioner does not violate his rights under the Eighth Amendment. Haldol is a medically recognized treatment for anyone suffering from schizoaffective disorder. The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency.

This Honorable Court in Penry v. Lynaugh, __ U.S. __, 109 S.Ct. 2934, ____ L.Ed.2d ____ (1989), held that the Eighth Amendment does not prohibit per se the execution of an inmate who is mentally retarded. A fortiori, a death row inmate who is mentally ill and whose competency for execution is achieved and maintained by medication should have no greater right than a mentally retarded inmate, whose mental state cannot be improved through medication. The State of Louisiana argues that

once a mentally ill inmate has been sentenced to death, his mental illness is irrelevant unless it affects the de minimus competency standard as outlined in Ford.

A pre-trial detainee may be subjected to trial despite the fact that his competency is achieved and maintained by medication. Louisiana has recognized this principle in its jurisprudence since 1969. Because a condemned inmate is entitled to diminished constitutional protections, he should not be afforded greater rights than a presumptively innocent individual who faces trial. Once a condemned inmate is declared competent for execution, his medication should be a factor only if it impinges upon the de minimus competency requirement.

The State of Louisiana does not concede that Michael Perry has a liberty interest to be free from the forcible administration of an antipsychotic drug that is designed to achieve and maintain competency for execution. However, if such a "right" exists, the State argues the liberty interest was extinguished when a validly imposed sentence of death was rendered by the jury. In the alternative, should the Court hold that Perry retained his liberty interest despite his conviction, the State of Louisiana argues that his interest must give way to the State's overriding and legitimate interest in carrying out the sentence retribution.

Despite the inmate's wishes, the State of Louisiana, under its parens patrie and police powers, has an affirmative duty to provide all incarcerated inmates with adequate psychiatric care, including the administration of antipsychotic medication. Deliberate indifference to the inmate's mental health violates his constitutional guarantees under the Eighth Amendment.

Both federal and state statutes subsume the necessity of medical treatment with a judicial finding of incompetency to proceed to trial. A death row inmate who has raised the shield of incompetency to proceed to execution has implicitly authorized the State to medicate him, if necessary, to achieve competency.

The petitioner has the burden to prove a national consensus against forcibly medicating death row inmates. He has failed to do so. Furthermore, the petitioner's counsel has not established a conflict in the district courts, which allow forcible medication of civil committees and pre-trial detainees, provided professional judgment is exercised, and judicial review is provided.



The trial court's determination of competency to be executed (i.e., competent only when medicated) was made in accord with Ford v. Wainwright. The procedural due process which governs the inquiry into competency to be executed requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker. Inmate Perry enjoyed procedures far in excess of de minimus constitutional standards. Further, the trial court's conduct of the proceedings was eminently fair and conscious of the significance of the proceeding.

The trial court ordered treatment of the condemned inmate premised upon the findings of competence only when maintained on medication. The treatment order was made in accord with this Honorable Court's decision in Vitek v. Jones, which implicitly recognized that nonconsensual treatment may occur as a result of a determination that treatment is needed. Alternatively, if due process requires an additional decisionmaking process prior to nonconsensual treatment, then such decision is left to the professional judgment of medical personnel at the custodial institution.

## INTRODUCTION

In Ford v. Wainwright 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986), this Honorable Court held that a state could not impose the death penalty upon a prisoner who had become insane subsequent to his conviction. To do so, the majority of this Court concluded, would be cruel and unusual punishment under the Eighth Amendment. Writing for the plurality, Justice Marshall stated that neutral, expert opinions should allow a court to focus on "the prisoner's ability to comprehend the nature of the penalty" and that the condemned inmate's mental illness must prevent him from "comprehending the reasons for the penalty or its implications." Ford 106 S.Ct. at 2606. Justice Powell, concurring in part and concurring in judgment, was the only justice to directly address the standard by which post-conviction competency should be measured. That standard - whether the condemned inmate is aware of his impending execution and the reason for it - has subsequently been cited with approval by Justices Brennan and Marshall, in Johnson v. Cabana, ____ U.S. _____, 107 S.Ct. 2207, ____ L.Ed.2d _____, (1987) (Brennan, Marshall, J.J., dissenting) and most recently, in Penry v. Lynaugh, ____ U.S. _____, 109 S.Ct. 2934 (1989), ____ L.Ed.2d _____, (1989). In Penry this court held, in part, that the Eighth Amendment did not prohibit the execution of a

mentally retarded person with the reasoning ability of a 6 1/2-year-old child. Ford, furthermore, was cited in Penry for the premise that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." Penry, 45 Cr.L. at 3196 (1989), citing from Ford, 477 U.S. at 422 (1986) (Powell, J., concurring in part and concurring in judgment.)

New questions which necessarily evolved from the Ford and Penry decisions are now before this Honorable Court. Is a death row inmate's execution stayed simply because his competency is achieved and maintained by medication? May a condemned inmate refuse medication that is designed to achieve and maintain competency as a means to thwart the imposition of a legally imposed death sentence? Does a death row inmate have a constitutional right to choose insanity over the electric chair? The State of Louisiana respectfully argues that the competency constitutionally mandated by Ford may be achieved and maintained, if necessary, through nonconsensual, medically supervised treatment, including the administration of antipsychotic medication. The authorities discussed below indicate that a death row inmate simply cannot be allowed to choose insanity as a means of granting his own personal stay of execution.

Petitioner, death row inmate Michael Owen Perry, is before this Court seeking writ of certiorari primarily on the grounds that the nonconsensual, medically supervised administration of the antipsychotic drug Haldol to meet the Ford standard violates his rights under the Eighth and Fourteenth Amendments. Before addressing these issues in detail, the State of Louisiana first would like to alert this Court to the many inaccuracies contained in the petitioner's brief. First, there is no evidence in the record that Michael Owen Perry has ever been medicated against his will.[1] Any medication administered, has been only upon his physician's

1. Counsel for the petitioner can point to no record reference that shows that Michael Owen Perry has been forcibly administered either oral or intramuscular medication. The State of Louisiana, thereby, questions whether Perry even has standing upon which this issue may be addressed.



order and directive, and administered only at regulated intervals.[2] While on medication, Perry's mental condition stabilizes so that he is not a danger to himself or others. The medication eliminates Perry's delusions and hallucinations. At times, Perry himself has requested the medication. An additional benefit is that Perry's competency for execution is also maintained. It is this latter benefit that troubles Perry.

Relying on Louisiana's jurisprudence that adopted the Ford standard as the de minimus test for competency to be executed, the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, ruled on October 21, 1988 that Michael Owen Perry is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment." (R. pp. 0784-85.) The district court's holding was bifurcated. While Perry is competent to be executed, that competency is achieved and maintained only through the administration of Haldol. (R. p. 0005). This implies that Perry is not competent for execution in his unmedicated state. There is no dispute that Perry suffers from schizoaffective disorder; all doctors who have examined him have made the same diagnosis. The mental illness, however, can be controlled through the use of antipsychotic medication, much like diabetes is controlled by insulin injections. The structure of this brief will be first to establish the arguments underlying the State's position that medically induced competency is constitutionally acceptable under Ford. Next, the State will argue that a condemned inmate must be medicated without his consent if such medication is necessary to carry out a legally imposed death sentence. Finally, the State will address the procedural due process protections that may be required for the condemned inmate.

The State of Louisiana respectfully contends the sole focus should be on competency, regardless of how it is achieved or maintained, and regardless of whether the condemned inmate consents to the necessary medical treatment or not. Otherwise,

2. Medication is administered routinely (R. p. 0753-54) that is, one monthly intra-muscular injection and a daily oral supplement three times per day. Doctors also testified that Perry's condition only improves with medication. (R. p. 0557). Counsel for the petitioner has stated that Perry decompensates even while on "massive" dosages of antipsychotic medication. This statement is taken out of context. In fact, Dr. Cox testified that if Perry was still hallucinating despite the medication, one solution was to increase the dosage. (R. p. 0737-38). Perry must be on a consistent medical treatment plan for three months just to stabilize his mental state. (R. p. 0742-44).

a death row inmate has the power to thwart the State's attempt in carrying out a validly imposed death sentence. Most importantly, the State of Louisiana beseeches this Honorable Court to deny the petitioner's request for writ of certiorari. As stated above, there is no evidence in the record that Perry has ever been forcibly medicated. Furthermore, Perry has pointed to no conflict in the district courts concerning the relevant legal issues.



ISSUE I.

May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

ARGUMENT

1. Ford v. Wainwright implicitly recognizes that medically aided competency achieved by the administration of antipsychotic medication is acceptable for purposes of competency to be executed.

The State of Louisiana contends that medically aided competency is sufficient competency for execution under the Eighth Amendment. The rationale behind the competency standard as announced by Justice Powell, is to ensure that the two major purposes of the death penalty - retribution and deterrence - are served. Synthetic competency serves both purposes. First, the antipsychotic medication assures the mentally ill condemned inmate that he has sufficient mental capacity to understand that he is being executed for the crimes he committed. Thus, retribution is served. Second, the medication achieves and maintains competency so that the execution may lawfully take place. Therefore, the deterrent factor for society as a whole is served.

The State's position that synthetic competency is sufficient under Ford is further supported by the reasons for requiring that a minimum competency level be met. A stay of execution under Ford is not triggered unless the condemned inmate is so mentally deficient that he is unaware of his impending execution and cannot comprehend the reason for it. The medication itself has no bearing on the reasons competency is required. Either the inmate is competent or he is not. If anything, medication actually enhances an inmate's level of competency. Therefore, the inmate's competency, whether or not medication is involved, should be the sole inquiry.

The resolution of this issue may very well affect the State of Louisiana's right to demand retribution from this petitioner. Expert testimony at Perry's sanity hearing was unanimous that Perry, medicated or not, presently knew of his impending death and the reason for it. Dr. Cox expressed the opinion, however, that if Perry is allowed to remain off

antipsychotic drugs for as little time as three weeks, Perry may decompensate to the point of being incompetent for execution. (See Dr. Cox's report, dated April 20, 1988). Therefore, under the Ford standard, the State of Louisiana's right to seek retribution against Perry may very well be hinged upon its right to forcibly medicate him, if necessary. A death row inmate should not be allowed to escape execution under Ford by refusing medication necessary to achieve or maintain competency.[3]

If medication is a factor in the competency equation than this presupposes that a mentally ill capital offender has greater constitutional rights than a capital offender who is not mentally ill. Furthermore, medicine administered to a condemned prisoner to prevent delusions and hallucinations also can only enhance that inmate's chance "to prepare mentally and spiritually, for their death" as Justice Powell said in Ford , citing Coke. Ford, 105 S.Ct. at 2608. The Eighth Amendment assures an inmate that he will be given time to prepare for his death, and that he will know the reason why his life is being extinguished. Medication satisfies the Eighth Amendment mandate that these assurances are met. If Perry is allowed to avoid his death sentence by refusing to submit to medical treatment, the result would be that a death sentence would be decided on the fortuity of whether the condemned inmate voluntarily chose to be medicated or not. Mentally ill death row inmates would thereby have greater rights than those who are not mentally ill.

The State's position that a mentally ill death row inmate has no greater rights than any other death row inmate is further supported by the Court's opinion in Murray v. Giarratano, ___ U.S. _____, 109 S.Ct. 2765, ___ L.Ed.2d _____ (1989), 45 Cr. L. 3155. Giarratano held that in a post-conviction proceeding, a state could validly deny under the Eighth Amendment and the Due Process Clause appointed counsel for an indigent offender, whether or not the offender was sentenced to death row. In other words, this Court recognized that a capital offender had no greater right to counsel during post-conviction relief, than did a non-capital offender. Likewise, the State of Louisiana posits that the

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3. The record clearly supports a strategy between Perry and his counsel to refuse medication, and thereby induce insanity as a loophole to execution. (R. pp. 0753-54; 0717-18). Perry himself said: "...[I]t's just -- it's very simple to understand, take my pills and die, don't take my pills and live ... so I'm not going to take my pills." (R. p. 0717-18).



status of mentally ill should not carry with it greater constitutional protections. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

While Ford did not directly address the issue of synthetic competency, the words of Justice Powell intimate that medication to achieve sanity is presumed to follow a stay of execution:

> "It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless OR UNTIL he recovers his sanity cannot be deprived without a 'fair hearing'." Ford 106 S.Ct. at 2609 (Powell, J., concurring). (Emphasis provided).

Justice Powell's footnote in Ford even more clearly establishes that competency achieved through medication would satisfy the Eighth Amendment. As Justice Powell so aptly stated in his opinion, the question is not WHETHER Perry will be executed, but WHEN. Justice Powell continued in a footnote:

> "It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that IF PETITIONER IS CURED OF HIS DISEASE, THE STATE IS FREE TO EXECUTE HIM." Ford, 106 S.Ct. at 2610 (Powell, J., concurring) (footnote No. 5). (Emphasis provided).

These words of Justice Powell indicate that once incompetency is judicially established, the condemned inmate should then be treated in an attempt to restore sanity. Once sanity is restored, the inmate is again eligible for execution. This is precisely the procedure recognized at common law in Louisiana since 1896. (See State's Brief to the Louisiana Supreme Court, Appendix A, p. 96). Treatment of a mentally ill prisoner necessarily implicates medication; otherwise, in most instances, no cure or remission of the illness is possible. Therefore, the State of Louisiana respectfully submits that competency, whether or not medication is involved, is all that Ford requires.

(a) The administration of antipyschotic medication to a mentally ill prisoner is not cruel and unusual punishment.

The petitioner's counsel has equated Perry's medication as punishment itself under the Eighth Amendment, which is an incorrect conclusion. The Eighth Amendment only

prohibits cruel and unusual PUNISHMENT. The punishment in this case is death by electrocution, a validly imposed sentence under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment. Haldol is a medically recognized treatment for anyone afflicted with Perry's mental illness. Haldol is not being administered to him because he premeditated the execution of five family members including his parents and a 2-year-old nephew. Haldol is a medicine prescribed for many individuals who suffer from mental illnesses or disease. Therefore, opposing counsel is misdirecting the Court's attention when they attempt to argue that the medication administered to Perry is cruel and unusual punishment under the Eighth Amendment. At best, the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out.

The State can best illustrate its position that Haldol itself is not punishment by pointing to an outstanding All-American basketball player, Chris Jackson of Louisiana State University. Jackson, who takes Haldol on a daily basis for a neurochemical disorder called Tourette's syndrome, needs the medication to avoid uncontrollable twitching and spasmodic body movements. (See Appendix A, p. 162). This example further illustrates as absurd any of the petitioner's arguments that equate the administration of Haldol to Perry as the equivalent of a frontal lobotomy.

The sincerity of opposing counsel's concern for Perry's well-being is also suspect, at best. Petitioner's counsel, Keith Nordyke, had ordered Perry abruptly removed from his medicine just prior to an upcoming courtroom appearance, without any consideration whatsoever for the consequences that are suffered with sudden withdrawal from antipsychotic medication. Nordyke's "Do-Gooder" motion was in actuality an attempt to induce a calculated insanity as a means to avoid a validly imposed death sentence. Nordyke's decision was aimed at defeating the death penalty, even if that meant Perry may become insane. Ironically enough, Nordyke himself is attempting to sentence Perry to a life of incarcerated insanity, which is certainly a cruel and unusual punishment under the Eighth Amendment. Now he appears before this Honorable Court to argue that the administration of medication, to which all doctors have testified alleviates the symptoms of Perry's illness while at the same time achieves and maintains competency, is cruel and unusual punishment.

In fact, the medicine is in both Perry's and the State's best interests. Dr. Cox, one of Perry's treating



psychiatrists, has recommended that Perry be treated with Haldol. The trial court during Perry's competency hearing questioned Dr. Cox concerning the medication, and asked whether any less intrusive medicine could stabilize and improve Perry's mental state. Dr. Cox responded: "No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs..." (R. at p. 0745). Professional medical opinion, thereby, supports the administering of Haldol to Perry as the means best designed to serve his medical needs. At the same time, Haldol serves the State's purpose of achieving and maintaining competency for execution. There is also no alternative, less intrusive, medication that will satisfy the same needs.

Opposing counsel has also strenuously objected to the administration of antipsychotic drugs because of side affects that may occur. Yet nothing in the record supports the fact that Perry now suffers from any side effects. Dr. Cox stated he has never seen Perry suffer from any side effects (R., p. 0746) and that he does not now suffer from tardive dyskinesia. (R., p. 0574-75). Dr. Cox also predicted that even if Perry was continuously medicated with antipsychotic medication for the next five years he had only about a one in four, or one in five, chance of developing tardive dyskinesia, the most severe possible debilitating side effect. (R., p. 0574-75). There is also evidence in the record that Perry may pretend to suffer from some of the lesser side effects, such as drooling and impairment of his movement. (R. pp. 0527-9). The benefits of Haldol clearly outweigh any minor side effects. At the same time, many side effects themselves can be controlled by medication. Ironically enough, while Nordyke has criticized the State of Louisiana for allegedly administering Haldol to Perry because of these possible side effects, his own order to abruptly stop all medication subjected Perry to identical side effects. Sudden withdrawal from Haldol may cause a patient to suffer dyskinetic movements indistinguishable from tardive dyskinesia. (See Appendix A, p. 163).

(b) Ford v. Wainwright and Penry v. Lynaugh support the death penalty for mentally ill inmates whose competency is achieved and maintained through medication.

Decisions of this Court support the argument that a death row inmate's mental state - be it mental illness or mental retardation - is not itself dispositive of whether or not the inmate is eligible for execution. Ford illustrates the argument that mental illness per se is not a bar to imposing

the death penalty. If this were true, there would be no need for a de minimus competency standard. A physician's diagnosis alone that the inmate was suffering from a mental illness would automatically commute a death sentence to life imprisonment. Also implicit in Ford is the proposition that a mentally ill condemned prisoner whose competency is achieved and maintained by medicine may be subjected to the death penalty. The only requirement is that the inmate be aware of his impending execution and the reason for it.

This Court also expressly held in Penry that a mentally retarded prisoner may be subjected to the death penalty. Mental retardation, unlike mental illness, is a permanent condition unaffected by medication. A fortiori, a mentally ill death row inmate whose competency is achieved by medication should have no greater rights than a mentally retarded death row inmate, whose mental state is unalterable. As Penry established, a jury should consider mental retardation and the defendant's history of child abuse as mitigating evidence in the sentencing phase. In Perry's case the jury considered and rejected his history of mental illness as a reason to not impose the death penalty. The State's position is that, once a death sentence is validly imposed, evidence of mental illness or mental retardation is irrelevant under Ford unless it affects the de minimus competency standard. The only focus should be whether the Ford competency test is achieved. The Eighth Amendment does not otherwise prohibit execution of a competent prisoner regardless of the inmate's mental status.

(c) Synthetic competency has been recognized as sufficient competency under which a presumptively innocent individual stands trial. Therefore, a convicted murderer whose competency is achieved and maintained through medication should have no greater right.

Louisiana's jurisprudence had recognized that synthetic competency is sufficient competency upon which a defendant may stand trial. See State v. Hampton, 218 So.2d 311 (La. 1969) and State v. Lawrence, 368 So. 2d 699 (La. 1979). Decisions of the Louisiana Supreme Court and the First Circuit Court of Appeals have also approved compelled medication as a condition precedent to release of insanity acquittees. See State v. Collins, 381 So. 2d 449 (La. 1980), and State v. Boulmay, 498 So. 2d 213 (La. App. 1 Cir. 1986). Historically, the Louisiana courts look to the individual's present condition only. How that person's competency is maintained or achieved has no bearing upon whether that person is competent for trial, or eligible for discharge from a commitment. Because Perry's



writ application to the Louisiana Supreme Court was denied, the State of Louisiana can only assume that this analysis applies with equal force, regardless of whether the question is competency for trial, competency for discharge or competency for execution. The State believes that Perry and his counsel would become the most outspoken advocates of the Haldol medication if it meant that Perry would be freed from prison; and certainly opposing counsel would be alleging constitutional violations if Perry had been denied medical treatment prior to trial. Opposing counsel's true objection is the death penalty itself, not the Haldol treatment or the synthetic competency.

Two members of this Court suggested in Vincent v. Louisiana, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939, reh. den. (1985) (J J. Brennan, Marshall dissenting) that a mentally ill defendant may have been denied a fair and impartial trial because he was denied the antipsychotic drug Thorazine. Justice Brennan wrote: "There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated." Vincent, 105 S.Ct. at 930. This passage certainly implies that synthetic competency to stand trial is constitutional, indeed even required. If synthetic competency is permissible, and, in view of the Vincent dissent, constitutionally mandated prior to conviction, then it must also be acceptable during a post-conviction proceeding as well.

The State of Louisiana further contends that competency is not contingent upon whether the individual is medicated or not. Competency is competency, regardless of medical treatment. The Fifth Circuit of the U.S. Court of Appeals in U.S. v. Haynes, 589 F.2d 811 (5th Cir. 1979) agreed. In Haynes a former police chief had been convicted of aggravated assault and depriving another of his right to liberty without due process of law, resulting in his death. On appeal, the defendant claimed he had been incompetent to stand trial because his competency had been attained through medication. The Fifth Circuit rejected this claim.

> Nonetheless, it is argued that without large doses of Aventyl (an anti-depressant) and Mellaril (an "anti-psychotic" drug), defendant would be incompetent.... The court's inquiry is limited to determining whether defendant is able to assist in his defense and comprehend the nature of the proceedings against him. Once it is determined that he is competent to stand trial, the method of

> achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings. U.S. v. Haynes, 589 F. 2d at 823 (5th Cir. 1979). (Emphasis provided).

The State of Louisiana respectfully submits that if a defendant's competency for trial may be constitutionally maintained and achieved by medication, then it is also constitutional that a death row inmate's competency for execution may be maintained and achieved by medication. Justice O'Connor stated in Ford that a death row inmate has fewer constitutional protections post-conviction than what were afforded him prior to conviction. "...[O]nce society, has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, 106 S.Ct. 2612 (O'Connor, J., concurring in part, dissenting in part). If synthetic sanity is acceptable at a time when the Constitution affords its greatest protection, then it must logically follow that synthetic sanity is acceptable when the Constitution's demands have diminished.

2. A death row inmate does not have a "right" to be free from nonconsensual medical treatment that is designed to achieve and maintain competency for execution.

The State has chosen the word "right" to define whatever Perry is claiming for lack of a better word. The first question is: what is the "right"? Is it the "right" to be free from involuntary medication? In the context of a death penalty case, this "right" would have even more implications. Of crucial importance is that the medication is designed to achieve and maintain competency for execution. If this Court were to recognize a death row inmate's "right" to refuse medication, a necessary corollary question would arise: Does a death row inmate have the "right" to induce insanity? A diligent search by the State found no guidance from this Court on whether Perry would have a constitutionally recognized right to be free from a medication that is designed to achieve and maintain competency, and thereby have a "right" to induce



insanity. The source of such a "right" is also unclear in this Court's jurisprudence, on whether it may be a liberty interest or a state-created interest enforceable through the Due Process Clause. Perry has neither identified the authority that supports his claimed liberty interest, nor proven its source from either federal or state law. Instead, the petitioner has asserted his rights in a laundry-list fashion without further explanation. (Pet.'s Brief, p. 23)[4]

The State of Louisiana is not willing to concede that Perry has a protected liberty interest to avoid forcible medication with the antipsychotic drug Haldol. This Court has not declared such a right. In fact, in Mills v. Rogers 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), Justice Powell expressly reserved the ability to address the question of whether such a "right" does exist under the federal constitution itself. The Mills case was a class action suit by mental patients who were claiming, among other things, that the forcible administration of antipsychotic drugs violated their rights under the federal constitution. The parties involved accepted as a given that this protected liberty interest existed under the federal constitution. In dismissing such a "right", Justice Powell stated:

> As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution,...and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only 'assuming' the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests. Mills 102 S.Ct. at 2448, (Footnote No. 16; citation omitted).

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4. Because the petitioner's counsel in their brief to this Court discussed the Eighth and Fourteenth Amendment arguments in a illogical manner, the State of Louisiana was unable to distinguish exactly what "rights" the petitioner was claiming were violated, and from what source those "rights" emanated. Therefore, the State has chosen to address issues it believes are underlying this petition, and then address the petitioner's concerns in relation to those issues. The State will not re-address issues based on state law. Those issues including the standard of competency for execution in Louisiana are briefed in Appendix A. The Louisiana Supreme Court in State v. Perry, ____ So.2d _____(La. 1989) Nos. 88-KD-2239 and 89-KA-0159, (May 12, 1989; reconsideration denied, State v. Perry, ____ So.2d ___ (La. 1989) (June 16, 1989) ruled against the petitioner.

Until directed otherwise, the State is hesitant to recognize a "right" that has no textual source and has not been identified by this Court as emanating from the Constitution itself. Therefore, there is no presumption in the case at bar that such a "right" exists.

(a) Assuming arguendo that a death row inmate does have a constitutionally protected liberty interest, that interest was extinguished upon the imposition of a valid death sentence.

If this Court should find that such a protected liberty interest does exist, the State responds that a death row inmate's interest in being free from a medication that is designed to achieve and maintain competency for execution was extinguished upon the imposition of a sentence of death. Such an extinguishment of a liberty interest is understood in many contexts. For instance, a defendant loses his liberty interest to be free from confinement once a jury returns a verdict of guilty as charged. In a death penalty case, the condemned inmate further loses his right to life once a legally imposed sentence of death is declared. A death row inmate's status alone mandates special consideration not found in any other context. For instance, the liberty interest of an involuntarily committed individual who has committed no crime cannot be on par with an individual who is responsible for five brutal killings. We must not forget that the medication is aimed at achieving and maintaining competency for carrying out the jury's decision. Society itself demands only one conclusion. Any liberty interest Perry may have had was extinguished when the jury rendered its sentence of death.

This Court in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976), 49 L.Ed.2d 451 recognized that a prisoner who was validly convicted and sentenced does not retain a liberty interest to remain in any one particular prison. On the contrary, the state has the authority to transfer the prisoner to any of its prisons. The court stated: "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in ANY of its prisons." Meachum 96 S.Ct. at 2538, (Court's emphasis).

Perry was placed on death row with the expectation that some day, after he had exhausted all avenues of appeal, the State of Louisiana would execute him. Perry's expectation, therefore, is opposite to that of the inmate in Vitek v. Jones,



445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980). Justice White, in writing for the majority, had held that the involuntary transfer of an inmate from a prison to a mental hospital did require procedural protections under the due process clause, based upon a liberty interest created by a Nebraska statute that had allowed for such a transfer. The Court's reasoning focused on the fact that the prisoner could not have reasonably anticipated confinement in a mental hospital at the time he was convicted and sentenced. In contrast, Perry knew that the State of Louisiana would do everything within its power to carry out the legally imposed sentence of death. Medication to achieve and maintain competency for execution is within the range of expectations likely to confront any condemned inmate whose mental illness had been judicially established. Perry himself has raised the shield of mental incompetency as a reason not to carry out a lawfully imposed sentence. Do we now let him turn that shield into a sword by refusing medication in an attempt to thwart society's legitimate interest in retribution? Implicit in the death row inmate's questioning of his competency is the State's authority to treat him if necessary to achieve or maintain competency for execution. Medication of a mentally ill inmate is reasonably expected. In direct contrast to Perry's case, the inmate in Vitek could not have expected that his prison term would include involuntary transfer to a mental hospital. For Perry, it is within the range of conditions of his conviction and sentence that he submit himself to treatment so as to maintain his competency to be executed.

The State of Louisiana also maintains that nonconsensual medication to achieve and maintain competency is within the legitimate limits of this State's authority to carry out Perry's sentence. This Court in Montanye v. Haymes 427 U.S. 236, 96 S.Ct. 2543 (1976), 49 L.Ed.2d 466 stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye 96 S.Ct. at 2547. The medication of Perry is a necessary concomitant to carrying out his sentence of death. Therefore, any liberty interest to refuse reasonable and nonarbitrary medical treatment was extinguished contemporaneously when Perry's liberty interest to life was extinguished - that is, when Perry's sentence of death was imposed.

The State does recognize that Perry may still retain a residual liberty interest. While a conviction and subsequent

death sentence greatly diminish a death row inmate's constitutional rights, he does not forfeit all such protections. Wolff v. McDonnell 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) recognized that "the touchstone of due process is protection of the individual against arbitrary action of government." The State concedes that Perry may have a liberty interest to avoid experimental drugs or extreme medical procedures that are outside the mainstream of professional medical practice. Haldol is not such a drug; it is a well recognized, medically acceptable treatment for anyone suffering from schizoaffective disorder. The nonconsensual administration of Haldol to Perry is an appropriate and reasonably anticipated measure by the State of Louisiana to assure his competency for execution.

(b) In the alternative that a condemned inmate does retain a liberty interest to refuse medication despite his conviction, the State has an overriding interest to ensure that his death sentence is implemented.

Assuming the condemned inmate has a liberty interest under the Fourteenth Amendment to refuse mental health treatment and thereby induce insanity, the State has an overriding interest to seek retribution under a validly imposed death sentence. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) this Court recognized a balancing of the state's legitimate security interests against the inmate's privacy interests when it held that the Fourth and Fifth Amendments did not prohibit the visual body-cavity searches of pre-trial detainees following contact with outside visitors. The Court found that the search was a reasonable response to a legitimate security interest.

In this case, the State of Louisiana is asserting that its legitimate interest of retribution outweighs any retained liberty interest by the condemned inmate to refuse medication that is designed to achieve and maintain competency for execution. If necessary, the state should have the authority to forcibly medicate Perry so that the execution may proceed. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) this Court reaffirmed that the Eighth Amendment is subject to a flexible interpretation that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 598 2 L.Ed.2d 630 (1958). State legislatures by statute have approved forcibly medicating inmates if necessary. The jurisprudence of this Court indicates that only excessive punishment, either because it involves the



unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime, is prohibited under the Eighth Amendment. Execution while the inmate is medicated with Haldol is neither excessive nor disproportionate. The State of Louisiana contends that Perry had not proven that his execution effectuated through the nonconsensual treatment with Haldol is a sanction that is imposed without any penological justification and "results in the gratuitous infliction of suffering." Gregg 96 S.Ct. at 2929. Perry's medical treatment is not being inflicted in an arbitrary or capricious manner; it is the same treatment afforded anyone with schizoaffective disorder. Perry just happens to also be on death row. To allow Perry a constitutional right to refuse medical treatment that is designed to achieve and maintain competency for execution is to deny the people of the State of Louisiana their legitimate right to retribution. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

The Ford opinion itself recognized the state's interest in retribution, thereby requiring that the condemned inmate know of his impending death and the reason for it. Otherwise, if the inmate lacks this capacity, his execution as to him is meaningless. Justice Powell called the state's interest in carrying out a validly imposed death sentence "a substantial and legitimate interest in taking petitioner's life as punishment for his crime." Ford 106 S.Ct. at 2610 (Powell, J., concurring).

Other factors in the balancing of interests prove that the benefits of the Haldol medication outweigh any possible side effects. There is no evidence in the record that Perry has suffered any side effects. It is also important to note that a symptom of the illness is to refuse medication. Medication is also required as a starting point before any behavior modification therapy may be administered. The only adverse impact that Perry has alluded to is the possibility of contracting tardive dyskinesia five years from now, and then the chances of that occurring are, at worst, one in four.

Opposing counsel in their brief to this Court conceded that an incompetent inmate could be forcibly medicated by the state. Their brief to this court repetitiously recites that

Perry is insane. The record, however, fails to prove that Perry has ever been adjudged insane, either at the commission of the crime or at trial. Assuming arguendo that Perry was and is insane, his counsel then asserts: "Non-consensual medication is permitted only upon a finding of incompetence." (See Pet.'s Brief, p. 11). This assertion leads the State to conclude that our opposing counsel has conceded to the state its authority to medicate Perry against his will "upon a finding of incompetence.".

3. The State of Louisiana has a duty to provide medical treatment to all prisoners including mentally ill death row inmates.

Beginning with the premise that Perry is insane, as his counsel so adamantly argues, Perry's lawyers then also posit that Perry is competent to refuse needed medical treatment. In other words, an "insane" murderer knows treatment with Haldol is not in his best interest. The lack of logic of this argument is self-evident. However, even if one ignores this nonsensical line of reasoning, opposing counsel still has yet to address a very important argument that supports nonconsensual medical treatment - that is, the affirmative duty placed upon the State of Louisiana to provide adequate medical care to its incarcerated inmates.

In Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), this Honorable Court recognized a state's legitimate interest under its parens patriae power to provide adequate medical care for its mentally ill citizens. At stake also was the state's police power to protect the community at large from an individual who was a danger to others. Inside the walls of Louisiana State Penitentiary at Angola, there can be little doubt that an unmedicated Michael Perry would be a danger to other inmates and the institution's employees, as well as a danger to himself. One need only look at the numerous suicide watches called at Angola to protect Perry from himself and others.

Putting these concerns aside, even if this Court were to grant Perry the authority to refuse all antipsychotic medication, the State of Louisiana would be placed in a Catch-22 situation. The State could not forcibly medicate Perry, while at the same time, the Eighth Amendment under Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981) requires a state to provide adequate psychiatric care to incarcerated inmates. If an inmate proves that the penitentiary has shown a



"deliberate indifference" to his psychiatric needs, then the inmate has stated a cause of action under 42 U.S.C.A. § 1983. The Haldol treatment Perry has received is a necessary and reasonable psychiatric treatment required for his mental health and well-being. It would indeed be anomalous for this Court to hold that this very treatment required by the Eighth Amendment would at the same time violate that same amendment.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court held that deliberate indifference to an inmate's medical needs was cruel and unusual punishment under the Eighth Amendment. Would it not indeed be cruel and unusual punishment for the State of Louisiana to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations? Would this mental torture be the infliction of pain without any legitimate penological purpose? The State of Louisiana posits that such indifference would violate Perry's rights under the Eighth Amendment. Therefore, this Court must recognize Louisiana's parens patrie power to administer, forcibly if necessary, antipyschotic medication to a mentally ill inmate. As Blackstone once said, the sovereign or his representative is "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 255, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972) , citing from 3 W. Blackstone, Commentaries 47. Based on its parens patrie power, Louisiana has the power to do what is best for its citizens, including mentally ill death row inmates.

4. Federal and state statutory laws support the State of Louisiana's position that a finding of incompetency mandates the necessity of medical treatment.

The State of Louisiana will fully discuss in its argument on Issue II, infra, the reasons that support the State's position that the trial court's finding of competency, but competent only while medicated, implied the necessity of medical treatment, either with or without Perry's consent. At this point it suffices to state that both federal and Louisiana statutory law subsumes the necessity of medical treatment within a finding of mental incompetency.

Under 18 U.S.C. § 4245, once a pre-trial detainee is declared incompetent to stand trial, the individual is ordered to the custody of the U.S. Attorney General for treatment. In pertinent part, the statute provides:

> "If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General SHALL HOSPITALIZE THE PERSON FOR TREATMENT in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier." (Emphasis provided.)

This federal statute is based on the premise that once an individual is judicially determined to be incompetent to stand trial, the individual is then committed to a suitable facility for care or treatment. Under 18 § 4243 an insanity acquittee may be conditionally released on an order that the individual comply with a prescribed regimen of medical care.

As argued extensively in our brief to the Louisiana Supreme Court (see Appendix A, pp. 116-169), the State's position is that Louisiana's statutory law subsumes the necessity of medical treatment within a finding of incompetency. Simply stated, when Perry raised the issue of his competency to be executed, he implicitly authorized the State to medicate him if necessary to achieve and maintain competency. While Louisiana has no statutory laws governing competency to be executed, all other similar statutes dealing with competency to stand trial, civil committees, inmates who are found to be a danger to themselves or others, insanity acquittees, and probationers or parolees, imply an authorization to administer medical treatment once incompetency has been established. For example, La. C.Cr.P. art. 648 provides, in pertinent part, that the court "shall commit the defendant...for...treatment, as long as the lack of capacity continues." If a Louisiana court can constitutionally order a pre-trial detainee under art. 648 to submit to medical treatment once incompetency is established, the State must certainly have the same power over a death row inmate, who has invoked the shield of incompetency as a means to stay his execution. Furthermore, La. R.S. 28:55(I) provides in pertinent part regarding involuntarily committed persons that "[a] patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent...." It would be anomalous if a civil committee can be treated without his consent and a death row inmate cannot be so treated.

5. Petitioner has failed in his burden of proof to show any national consensus against forcibly medicating a condemned prisoner.



In determining the "evolving standards of decency that mark the progress of a maturing society," as announced in Trop v. Dulles, supra, this Court has looked not to the individual standards of decency held by each justice, but to society's standards of decency, especially those standards reflected in the statutes enacted by society's elected representatives. This practice of referring to the laws of the fifty states was followed by this Court in its major death penalty cases including Ford, Penry and Stanford v. Kentucky, ___U.S.____, 109 S.Ct. 2969, ___L.Ed.2d ____ (1989). The State of Louisiana respectfully submits that the petitioner has not established a national consensus against forcibly medicating a death row inmate in order to achieve and maintain competency for execution. Unless Perry does so, his claim that nonconsensual treatment violates his Eighth Amendment right lacks merit.

Finally, Perry has also failed to point to any conflict in the district courts as to forcibly medicating either involuntarily detained civil committees or pre-trial detainees. In U.S. v. Charters, 863 F.2d 302 (4th Cir. 1988), the Court of Appeals, on rehearing, held that a pre-trial detainee who had been found incompetent to stand trial could be forcibly medicated, as long as the government's action was not arbitrary or capricious, and as long as professional medical judgment was exercised and subject to judicial review. The Third Circuit of the U.S. Court of Appeals in Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983) held that a civil committee who was involuntarily placed in a mental facility could be forcibly medicated, provided accepted professional judgment was exercised and provided that the treatment regimen was one accepted within the medical community. The State of Louisiana argues that in the context of a death penalty case, the state's countervailing interest in retribution should override any interest Perry may retain in refusing antipsychotic medication. The medication is administered to Perry only under the exercise of professional medical judgment. Because the petitioner can point to no conflict in the district courts, and because the petitioner does not contend that any Louisiana statute as applied to him is unconstitutional, he has not supported his contention that a writ of certiorari should be granted.

ISSUE II.

Assuming that: (1) competency to be executed may be medically achieved and maintained through nonconsensual, medically supervised treatment; and (2) the condemned inmate has a remaining constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to such treatment?

A. Pretext

The petitioner asserts that he is (1) insane and/or incompetent; (2) that he has a right to refuse medical treatment designed to achieve his competency to be executed; and (3) that the trial court violated his procedural due process rights in the conduct of the hearing to determine competency to be executed and the subsequent order to submit to medical treatment.

Several matters must be addressed prior to beginning an analysis of these assertions. The State notes that the above issues are outlined by the undersigned writer. This was done because the inmate's several lawyers have failed to coherently delineate and analyze the issues. It was left to the respondent to discern their complaints from a confused, inarticulate petition for certiorari.

Second, it is important to recognize that this inmate has never been declared either insane or incompetent prior to or during the trial of this horrendous crime. Although inmate's counsel states in his third sentence of the brief that Perry "was found incompetent to proceed to trial several times", (see Pet.'s Brief, p. 4), such contention is simply incorrect. There is absolutely no such conclusion anywhere in the trial record. Such a misstatement is an example of inmate counsel's petition, which is replete with mischaracterizations.

Third, the claimed right to refuse medical treatment (designed to achieve competency to be executed) cannot be an absolute, categorical precept. If it were, then we would be giving the death row inmate the universal authority to choose a life of madness over a valid sentence of death. The right to refuse medical treatment must necessarily be a flexible right which is hinged on several variables. As stated in Argument I



supra, the inmate's right to refuse medical treatment is either extinguished upon rendition of a valid sentence of death, or, it is a right which must be weighed against state interests on a case-by-case basis.

Fourth, it is pertinent that this death row inmate has never been compelled to accept undesired medical treatment. Although inmate's counsel would have this Court believe that he was medicated in violation of a Louisiana Supreme Court stay order, (See Pet.'s Brief, p. 21, Note 12), this contention is erroneous. In short, this same contention was presented to the Louisiana Supreme Court and its answer was a writ denial. _____ So.2d _____ (La. 1989) (Nos. 88-KD-2239 and 89-KA-0159) (May 12, 1989) reconsideration denied, ____ So.2d _____, (La. 1989)(June 16, 1989). More important, is the fact that this inmate can point to no evidence in the record which buttresses his argument that he has been subjected to unwanted medical treatment. The testimony of several physicians demonstrates that Perry improves with medication and occasionally requests that he receive treatment. Thus, it appears that the matter now under consideration does not focus on an alleged deprivation of an assumed right to refuse medical treatment, but focuses upon an anticipated deprivation of the assumed right to refuse medical treatment. The anticipated deprivation to supposedly arise from the trial court's order. The trial court determined Perry to be competent when medicated and consequently ordered the Department of Corrections medical staff to provide nonconsensual medical treatment in order to maintain his competency to be executed. The condemned inmate is now applying for certiorari based upon treatment he anticipates occurring in the future.

This opposition to petition for certiorari rests upon several givens and assumptions. Given is the fact that the State of Louisiana has a death penalty for first degree murder. See LSA-R.S. 14:30. Also given is the fact that Ford v. Wainwright, supra, requires an inmate to be competent in order to be executed.

Assumed, is the proposition that medically achieved and maintained competence is sufficient to satisfy the Eighth Amendment right enunciated in Ford. Also assumed is the condemned inmate's proposition that he has a protected liberty interest in refusing medical treatment designed to achieve

competency to be executed.[5]

In view of the above givens and assumptions, the remaining questions are:

> (1) Was the trial court's determination of incompetency made in accord with procedural due process as set forth in Ford v. Wainwright?
>
> and
>
> (2) Did the trial court err in ordering treatment (to achieve competency) premised upon a determination of incompetency. Restated, does procedural due process require a second adversarial, adjudicative determination prior to treatment if the inmate refuses treatment?

B. Argument

> The proceedings below conclusively demonstrate that the death row inmate was correctly ordered to receive nonconsensual, medically supervised treatment designed to achieve competency to be executed; all in accord with procedural due process as mandated by the Fourteenth Amendment through Ford v. Wainwright.

1. The trial court's determination of incompetency (i.e., competency achieved through the use of antipsychotic medication) was made in accord with procedural due process as set forth in Ford v. Wainwright.

The trial court ruled as follows:

> For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or antipsychotic drugs, including Haldol, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection. (R. pp. 43-44).

5. Implicit in the claim of, or recognition of, any liberty interest to refuse treatment is the apparent negating of the inmate's initial claim that mental illness per se is a bar to execution. This argument is apparently unacceptable in view of Penry v. Lynaugh. In Penry, this Honorable Court rejected the proposition that retardation per se, pursuant to the Eighth Amendment, precludes the imposition of the death penalty.



In view of the trial court's ruling on competency and accompanying order of treatment, we must necessarily address the questions of: (a) What procedural due process must accompany the inquiry into competency to be executed; (b) What procedural due process in fact accompanied the trial court's determination of Perry's competency to be executed; and (c) Did the trial court err in the conduct of the competency hearing?

(a) The procedural due process essence of Ford, which is designed to govern the inquiry into competency to be executed, requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker.

Initially, we must recognize that the Ford court addressed two issues. The first issue was whether there was an Eighth Amendment substantive right not to be executed while insane. A majority of the Court agreed on this issue. Second, there was the issue of what procedures must accompany the inquiry into sanity. This Court debated over the question. Justices Marshall, Powell, O'Connor and Rehnquist expressed differing opinions on the matter.

Louisiana commentators have concluded, "[t]he procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive." Note, Ford v. Wainwright: Warning -- Sanity on Death Row May Be Hazardous To Your Health, 47 La. L.Rev. 1351, 1355 (1987). There is no other evidence of consensus.

The State of Louisiana, suggests that procedural due process must satisfy basic fairness by providing the condemned with:

> (1) Inclusion of the prisoner in the truth seeking process (i.e., the "opportunity to be heard") (based on the expressions of seven justices, but for Justices Rehnquist and Burger);

(2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (J. Marshall's plurality);

and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (J. Marshall's plurality and J. Powell's concurrence).

The State of Louisiana submits that Perry was afforded procedural due process in excess of constitutional requirements.

(b) The procedural due process which in fact accompanied the trial court's determination of Perry's competency to be executed exceeded de minimus federal constitutional standards.

The condemned inmate was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The procedural protections afforded to him exceeded even the most strident prerequisites of Ford. Basically, the trial court afforded to the inmate:

(i)The privilege of assistance of counsel;

(ii)The privilege of compulsory process;

(iii)The right to present evidence on his behalf;

(iv)The opportunity to choose half of the members of the sanity commission which evaluated him;

(v)The right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi)The privilege to participate in an adversarial hearing;

(vii)The privilege to testify as a witness and be videotaped for posterity;

(viii)The right to an independent and neutral decisionmaker outside of the executive branch of government;



(ix)The privilege of judicial review.

For a more detailed explanation of each of these rights and privileges, refer to the State's Opposition to Petition for Supervisory Writs, Louisiana Supreme Court, March 30, 1989. (Attached hereto as Appendix A). Specifically, refer to Section XI.

The only remaining question is whether some error occurred during the hearing process.

(c) The trial court's conduct of the competency hearing was impeccable, and certainly manifested no error of constitutional dimensions.

The inmate's petition for certiorari offers a smorgasbord of alleged trial court errors. (See Pet.'s Brief, pp. 30-35). All available "buzzwords" were shoveled to this Honorable Court. The complaints lack merit. Each of the current allegations was addressed and rebutted in the State's brief to the Louisiana Supreme Court (See App. A). Specifically, Sections XI(B)-(E), pp. 173-212, respond to and disprove the current arguments that the trial court erred during the conduct of the competency hearing.

Petitioner inmate now proposes that the trial court erred in accepting three updates on the inmate's medical condition. He characterizes the reports (which were filed in the trial record) as "ex parte Communication with the State." (See Pet.'s Brief, p. 30). Such characterization is inaccurate in light of the fact that the reports were offered by amicus curiae, who was custodian of the inmate, and were contemporaneously filed in the trial record for all parties to examine and act upon.

The State respectfully suggests that the trial court's receipt of continuing medical updates of the condemned inmate was not error. In fact, we suggest that it was highly pertinent and relevant material, without which, the factfinder may have made an ill-informed judgment concerning the inmate's fate. An ill-informed judgment can not be countenanced by anyparty or court. See Ford, supra, at 2606 and Ford, at 2611 (Powell, J., concurring).

Furthermore, we believe that there is an affirmative duty on the part of custodians who are entrusted with the treatment of incompetent inmates to periodically update the committing court. For example, in United States v. Curry, 410

F.2d 1372 (4 Cir. 1969) the Fourth Circuit stated that there "should be a requirement that the custodian report to the court on a prescribed schedule the mental health of his ward." at p. 1374. Also, in In re Harmon, 425 F.2d 916 (1 Cir. 1970) the First Circuit set out guidelines for psychiatrists who are responsible for the treatment of pre-trial detainees determined to be incompetent to stand trial. The Court stated "if the accused is committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246, the district court should require frequent reports on the accused's mental condition at stated intervals." at p. 918. Also see United States v. Geelan, 520 F.2d 585 (9 Cir. 1975).

Based on Ford's dictate that competency decisions be premised upon all available evidence; and upon Justice Powell's concurrence "that ordinary adversarial proceed[ings] ... are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" -- Ford, supra, at p. 2611 -- as well as the aforecited circuit court's expectation of medical updates by custodians; we suggest that the trial court committed no violation of procedural due process guaranteed to the condemned inmate.

To summarize, the trial court's conduct of the competency proceedings exceeded the procedural due process required by this Honorable Court in Ford. Moreover, the trial court committed no error of constitutional dimension by accepting medical updates on the condition of Michael Owen Perry. Therefore, petitioner's application for certiorari should be denied.

2. The trial court correctly ordered treatment of the condemned inmate based upon the determination of incompetency to be executed (i.e., competent only when maintained on medication.)

It is important to immediately recall that the trial court found that Perry was "competent for execution ....only while maintained on psychotropic medication in the form of Haldol." (R. p. 41). From this determination, we respectfully suggest that Perry may be incompetent when treatment is either denied or refused. The trial court's conclusion that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment. We believe that the trial court acted correctly when he ordered the Department of Corrections medical staff to treat Perry to maintain competency for execution.



The condemned inmate seems to argue that the trial court acted improvidently by ordering treatment without an additional adversarial, adjudicative determination on the subject of Perry's incompetency to make treatment decisions. This contention is misplaced.

There are several facts which are relevant to a determination of whether due process requires multiple adversarial, adjudicative proceedings. First, we must recall that the trial court concluded, as a matter of law, that Perry is competent only when medicated. Second, it is abundantly clear that he is not competent for execution, according to Ford, when not properly administered antipsychotic medication. Third, the doctors and the trial court agree that Perry is in need of medication because of his condition. Fourth, all doctors agree that Perry improves, to the level of competency to be executed, with the administration of antipsychotic medication. Fifth, the administration of antipsychotic medication is an approved and recommended treatment regimen for the diagnosed condition of schizoaffective disorder. And sixth, Perry has asserted, claimed and carried the burden of proving his (A) incompetency to be executed when unmedicated and (B) his need for treatment.

The combination of factors listed above mandates a finding that the trial court correctly ordered treatment of the condemned inmate premised upon a single finding of incompetency to be executed without treatment.

(a) This Court's decision in Vitek v. Jones implicitly recognizes and authorizes nonconsensual medical treatment upon a due process determination that treatment is necessary.

In Vitek v. Jones, 445 U.S. 80, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) an inmate brought an action challenging the constitutionality, on procedural due process grounds, of a Nebraska statute which allowed the Department of Correctional Services to transfer any prisoner to a mental hospital upon a physician's finding that the prisoner is suffering from a mental disorder. The issue, according to Justice White, was whether the involuntary transfer of a Nebraska state prisoner to a mental hospital for treatment implicates a liberty interest that is protected by the due process clause. This Court held that Jones' transfer to a mental hospital for the purpose of psychiatric treatment implicated a liberty interest protected by the Due Process Clause. Vitek, 100 S.Ct. at 1264. The apparent rationale for this Court's conclusions of a liberty interest insured by procedural protections was "the

stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness ....Ibid; emphasis provided.) Further, this Court identified the prisoner's interest as "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment...." Vitek, 100 S.Ct., at 1265. (Emphasis provided).

The above passages reveal this Court's finding that treatment necessarily follows a transfer to the mental hospital. Such finding is quite relevant to the current issue. The trial court below determined that treatment was authorized after a finding that treatment was necessary. In Vitek, this Court approved of a similar analysis. That is, once Nebraska determined the need for transfer (i.e., that the prisoner suffered from a mental defect which required treatment), then the authority to treat was available to the hospital officials. Implicit is that the hospital officials did not have to return to court for an additional adversarial, adjudicative proceeding to determine if the prisoner is competent to make decisions regarding his treatment. The determination of need for treatment in Jones' case was the authority for hospital officials to subject him to "involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...." Vitek, 100 S.Ct. at 1264. The State suggests that the trial court's conclusion of need for treatment is sufficient authority for the Department of Corrections medical staff to involuntarily administer antipsychotic medication to the condemned inmate. There is no need to conduct an additional hearing on the question of competency to refuse medication.

Recognition of the notion that an inmate is entitled to a single hearing prior to initiation of involuntary treatment is found in Baugh v. Woodard, 808 F.2d 333 (4 Cir. 1987). In Baugh, the Fourth Circuit rejected a suggestion that a due process required hearing must occur prior to the inmate's physical transfer to a mental health unit and before involuntary treatment began. Baugh, 808 F.2d at. 337.

In Stensvad v. Reivitz, 601 F.Supp. 128 (W.D. Wis. 1985) an involuntarily committed mental patient brought an action challenging nonconsensual drug treatment. At issue was whether a Wisconsin statute, which provided for no right to refuse drug treatment on behalf of involuntarily committed mental patients, was unconstitutional. The Court rejected the



constitutional challenge stating "that an involuntary commitment is a finding of incompetency with respect to treatment decisions. Nonconsensual treatment is what involuntary commitment is all about." Stensvad, 601 F.Supp, at 131. From Stensvad, it appears that Vitek has been interpreted to mean that a decision to commit amounts to the authority to treat despite the expressed desires of an involuntarily committed mental patient. Further, if such an interpretation of Vitek can apply to a mental patient, we suggest it applies with even greater force to a death row inmate.

In Lappe v. Loeffelholz, 815 F.2d 1173 (8 Cir. 1987) an inmate brought a 1983 action against prison officials to challenge the forcible injection of medication without a hearing as a violation of due process. At issue was whether the prison officials were entitled to qualified immunity on the basis that no right to refuse forcible medication had been "clearly established" by Vitek jurisprudence. "Lappe argue[d] that Vitek [citation omitted] clearly established that the fourteenth amendment entitled him to another hearing before he could be subjected to forced behavior modification." (Emphasis provided.) Lappe, 815 F.2d at 1176. The court rejected Lappe's contention. The court reasoned that "[O]nce Lappe was given a full hearing on the issues of his involuntary commitment and need for medication, it is not clear that the forced administration of Haldol deprived him of the protections established in Vitek." Ibid. The court also stated that "Lappe's liberty interest in not being classified and treated as a mentally ill individual was extinguished when he had his first hearing according to the procedures established in Vitek." Lappe, 815 F.2d at 1177.

Like Lappe, Perry received a trial court determination of his incompetency and corollary need for treatment. Like Lappe, Perry has received all necessary procedural due process prior to a nonconsensual, medically supervised administration of antipsychotic medication. Vitek and its progeny simply do not require an additional adversarial, adjudicative hearing prior to the forcible administration of medication which will maintain competency to be executed. Simply put, a single hearing and finding of incompetency is sufficient to authorize treatment by medical officials.

This position is supported by Dautremont v. Broadlawns Hospital, 827 F.2d 291 (8 Cir. 1987). In Dautremont, a former psychiatric patient brought a 1983 action against a hospital and physicians for deprivation of due process arising out of the involuntary administration of psychotherapeutic drugs. The court rejected the claim. Most significant to this case is

that the court accepted an Oklahoma commitment hearing as satisfaction of Iowa's authority to forcibly treat the patient. The court stated that "the pre-Oklahoma hospitalization hearing provided Dautremont all the process he was due in these circumstances." Dautremont, 827 F.2d at 197. This conclusion, of no need for a second hearing by a different state is indeed remarkable. It forcefully demonstrates that a second hearing would be duplicitious and fail to meaningfully advance any interest protected by the due process clause.

The State of Louisiana suggests that Dautremont is authority for the trial court's conduct of Perry's proceedings. The trial court's conclusions of competency only when medicated; Perry's need of the medication; the fact that Perry improves with the medication; the determination that the medication is an approved form of treatment for the illness; and the recognition that Perry proved his own need for treatment all support our contention that the trial court correctly ordered involuntary treatment.

(b) Should there be a due process requirement of an additional authorization to treat the condemned inmate; then Youngberg v. Romeo and U.S. v. Charters dictate that such decision is left to the professional judgment of the appropriate medical personnel at the custodial institution.

Alternatively, if this Honorable Court determines that: (1) a finding of incompetency to be executed does not amount to authority to involuntarily treat the condemned inmate; and (2) that the inmate retains a residual liberty interest in deciding whether to accept medical treatment designed to maintain competency; then the State suggests that the decision to involuntarily treat be left to the "professional judgment" of supervising doctors rather than an additional adversarial adjudicative proceeding.

In Youngberg v. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) this Honorable Court considered several questions, among them what was the proper standard for determining whether a state has adequately protected the rights of the involuntarily committed mentally retarded. If we assume that (1) inmate Perry's right to refuse medical treatment exists despite his conviction and sentence, and (2) that he retains a liberty interest as great as Romeo's; then we must determine how Perry's interests are to be judged and by whom. We suggest that Youngberg answers this question. This Court stated in Youngberg that "the decision, if made by a professional, [footnote omitted] is presumptively valid,



liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [footnote omitted]" Youngberg, 102 S.Ct. at 2462.

The Youngberg court seems to suggest that Perry's right to refuse medical treatment (designed to achieve his competency) can be assessed by professionals in the course of their duties rather than by an additional adversarial adjudicative proceeding.

In United States v. Charters, 863 F.2d 302 (4 Cir. 1988) (rehearing en banc), cert. applied for _____ U.S. _____, 44 Cr.L. 4178 (Feb. 14, 1989), an involuntarily committed pre-trial psychiatric patient appealed a district court order permitting the nonconsensual administration of antipsychotic medication. [6] The Charters issue may be restated as follows: Does the nonconsensual administration of antipsychotic medication, without a judicial determination that the patient is incapable of making his own medical decisions, unconstitutionally impinge upon protected liberty interests? The court, on rehearing, essentially concluded that the base-line decision to medicate should be made by appropriate medical personnel of the custodial institution, with judicial review available to guard against arbitrary governmental action.

The court stated "there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out." Charters, 863 F.2d at 314.

Further, the court rejected the proposition that an adjudicated incompetent (for commitment purposes) —can simultaneously maintain his competence to decide his own "best interests in receiving or declining medication." Charters, 863 F.2d at 310.

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6. The Fourth Circuit presumed that a legally confined person nonetheless retained an interest in refusing antipsychotic medication. In Charters, the government did not, as Louisiana suggests in II(A) above, assert that the supposed retained interests were displaced as "incidental to the basis for legal institutionalization." Charters, 863 F.2d at 305.

Counsel for the condemned inmate has suggested to both the trial court and the Louisiana Supreme Court that Perry is entitled to an additional adversarial, adjudicative proceeding to determine his competence to decline medical treatment. He has also suggested that it is incumbent upon the trial court to make a "substituted judgment" of Perry's "best interests" if it is determined that Perry is incompetent to refuse treatment.

The State of Louisiana contends that such equirements are unnecessary and unworkable. Without offer g multiple rhetorical questions to demonstrate the folly in such an approach, let it be said that few sane death row inmates will choose death over life.

Prior to Charters, United States District Courts have recognized that is is the duty of doctors, not courts, to decide whether an inmate is competent to refuse medication. See U.S. v. Bryant, 670 F.Supp. 840 (D. Minn. 1987); and U.S. v Leatherman, 580 F.Supp. 977 (D.D.C. 1983).

It is not a new premise to suggest that confined persons are not entitled to an additional court hearing on the question of forcible medication. We likewise suggest that, if Perry even retains any protected interests after his sentence of death and after a due process hearing on his competency to be executed, an additional adversarial, adjudicative proceeding is not required before forcibly medicating him.

## CONCLUSION

Petitioner's writ of certiorari should be denied. First, there is no evidence in the record that the petitioner has been forcibly medicated with antipsychotic drugs. Second, the petitioner has also failed to carry his burden of proving a national consensus against forcibly medicating a condemned inmate. Finally, the petitioner's counsel has neither pointed to a conflict within the district courts, nor claimed Louisiana law as applied to the petitioner is unconstitutional. Therefore, the petitioner has stated no ground upon which certiorari could be granted. The State of Louisiana therefore entreats this Court to deny the petitioner's application for certiorari.



EAST BATON ROUGE PARISH
STATE OF LOUISIANA

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Original Brief on Behalf of the State of Louisiana in Opposition to a Writ Application to the United States Supreme Court has been forwarded to Keith Nordyke, 427 Mayflower Street, Baton Rouge, La. 70802; Joseph Giarrusso, Jr., 643 Magazine Street, New Orleans, La. 70130; Annette Viator, Staff Attorney, La. Dept. of Corrections, P.O. Box 94304, Baton Rouge, La. 70804; and the Honorable L. J. Hymel, Jr., Judge, by placing same in the U. S. Mails, postage prepaid.

Baton Rouge, Louisiana, this 26th day of September, 1989.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: Rene' Salomon
RENE SALOMON
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me, Notary Public, this 26 day of September, 1989.

NOTARY PUBLIC

IN THE

SUPREME COURT OF LOUISIANA

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NUMBER 89-KA-0159

---

MICHAEL OWEN PERRY

VERSUS

STATE OF LOUISIANA

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STATE'S RESPONSE TO DEATH ROW INMATE'S
WRIT APPLICATION FOR SUPERVISORY AND REMEDIAL WRITS
FROM A POST-CONVICTION COMPETENCY RULING
OF THE NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
THE HONORABLE L. J. HYMEL, JR., JUDGE AD HOC PRESIDING
EAST BATON ROUGE DOCKET #9-85-472

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DEATH PENALTY CASE

ORIGINAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA,
APPELLEE/RESPONDENT



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* Ford v. Wainwright appears so often in this brief that it was not annotated at each point of reference.

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## STATEMENT OF THE CASE

Michael Owen Perry stands before this Honorable Court appealing the judgment of the Nineteenth Judicial District Court of East Baton Rouge Parish, the Honorable Judge L. J. Hymel, Jr., presiding, which determined that Perry is competent to be executed and that he can be treated without his consent so that competence can be maintained. (R. p. 0005).

The roots of this odyssey into Michael Owen Perry's competence to proceed to execution took hold in the opinion rendered by this Honorable Court in affirming Perry's conviction for the murders of his father, Chester; his mother, Grace; his cousins, Randy and Brian; and his two-year-old nephew, Anthony. State v. Perry, 502 So.2d 543 (La. 1986). In the opinion, this Court stated that "[w]e have determined the defendant was capable of proceeding to trial. A similar review might be in order prior to execution." Perry, at 564.

Upon denial of Perry's petitions for writ of certiorari and for rehearing by the United States Supreme Court, Perry v. Louisiana, 108 S.Ct. 205 (1987); Perry v. Louisiana, 108 S.Ct. 511 (1987), the trial court, in accordance with the guidance given by this Honorable Court, appointed a sanity commission on January 21, 1988 to determine the present competence of Perry. (R. p. 0002). The court appointed three psychiatrists; Drs. Theresita Jimenez, Aris Cox, and Glen Estes and one psychologist, Dr. Curtis Vincent to the sanity commission. (R. p. 0002). Pursuant to these appointments, each commission member was to examine Perry prior to a hearing set for April 20, 1988.

The trial court also appointed Keith Nordyke as Perry's representative in this competency proceeding. (R. p. 0002). This appointment authorized Nordyke to make decisions on Perry's behalf as deemed necessary and within Perry's best interests. (R. p. 0002). These motions were filed ex parte and sealed in the record at Nordyke's request. (R. p. 0002).

At the hearing of April 20, 1988, testimony was taken from each member of the sanity commission. The court, defense counsel, and the State each had the opportunity to examine and cross-examine each member of the commission. (R. p. 0496-0695).

At this hearing, Perry was given the opportunity to introduce six volumes of medical records, which included records of Perry's pre-trial confinement. It is also important to note that these records were inclusive only through January of 1988. (R. pp. 0539-0546). Counsel for Perry was also allowed to videotape Perry through the entirety of the hearing. (R. pp. 0502-0503).

The trial court originally set its ruling for May 26, 1988, yet reassigned its ruling date to August 26, 1988. (R. pp. 0002-0003).

On August 26, 1988, the court vacated and set aside its previous order appointing Nordyke as the person having authority to make decisions for Perry. (R. p. 0003). The court further ordered Drs. Cox and Jimenez to re-examine Perry relative to his competence to proceed to execution. (R. p. 0003). The court ordered Drs. Cox and Jimenez to appear on September 30, 1988 to testify concerning these new examinations. (R. p. 0003).

At this time, the court also ordered Perry treated and medicated as deemed appropriate by the Department of Corrections medical staff until the time when a final determination of Perry's competence would be rendered by the court. (R. p. 0307).

Upon Perry's seeking a stay order, this Honorable Court stayed the trial court's order of August 26th ordering treatment until a determination on the issue of competence was rendered. (R. p. 0305). This Honorable Court went on to deny Perry's request for a stay of the September 30th hearing. (R. p. 0314).

At the September 30th hearing, in order to gather as much information as possible before rendering a decision on Perry's competence to proceed, the court called Drs. Cox, Jimenez and Kovac to testify. (R. p. 0712). Testimony was taken from Drs. Cox and Kovac, with the court, Perry's counsel, and the State each having an opportunity to examine and cross-examine each witness. (R. pp. 0706-0748). Dr. Jimenez was unable to testify at this time due to illness; therefore, the court continued the matter until October 21, 1988 for additional testimony and a ruling. (R. p. 0004; 0712).



On October 21, Dr. Jimenez testified as to her examination of Perry as ordered by the trial court. The court, Perry's counsel, and the State were each given the opportunity to examine and cross-examine Dr. Jimenez. (R. pp. 0752-0761). At the close of Dr. Jimenez's testimony, the trial court gave Perry and the State an opportunity to present any other evidence, or call any other witnesses, that may have provided relevant evidence to the court's determination. (R. pp. 0761-0762). Having given the parties this opportunity, and having been offered no new evidence or witnesses, the court considered the matter submitted. (R. p. 0762).

Having considered the evidence submitted, the court rendered a determination finding Michael Owen Perry competent to proceed to execution. (R. p. 0791). The trial court further ordered that the Department of Corrections' medical staff was to treat Perry, through the use of their sound professional judgment, so that his competence to proceed to execution could be maintained. (R. p. 0792).

Michael Owen Perry now appeals this judgment and attendant orders of the trial court. The State asserts that the judgment and orders of the trial court are correct and should be affirmed.

## SUMMARY OF ARGUMENT

1. The State respectfully submits that the standard of competency in Louisiana is whether the condemned inmate knows of his impending death and the reason for it. The petitioner now before this Honorable Court is presumed sane. Therefore, to win a stay of execution, Michael Owen Perry must prove by a preponderance of the evidence that he has become insane subsequent to his conviction for five counts of first-degree murder. However, the record clearly shows that he has failed to rebut by a preponderance that sanity presumption. Michael Owen Perry knows of his impending death and the reason for it. Under the jurisprudence of this state and this nation, the State of Louisiana is free to impose a sentence of death upon the petitioner.

2. Louisiana's standard of competency for execution was first enunciated by Justice Lewis Powell in Ford v. Wainwright. The purpose of this standard is to define the type of insanity necessary before an execution must be stayed under the Eighth Amendment. The Ford standard - requiring the death row murderer know he will die for the crimes he committed - is the prevailing standard of all states that have adopted a death penalty. Louisiana has adopted this standard implicitly in its jurisprudence.

3. In addition to guaranteeing a condemned prisoner's rights under the Eighth and Fourteenth amendments and La. Const. art. 1 §20, the Ford standard serves the deterrent and retributive purposes of the death penalty. By adopting the Ford standard, Louisiana has fulfilled its jurisprudential promise to Michael Owen Perry not to execute him while he is insane.

4. The trial court's ruling that the petitioner is presently competent for execution because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment" is correct. Both the petitioner's own words and actions as well as expert testimony show that Michael Owen Perry understands the death penalty and knows why he is being forced to forfeit his life. Following this State's jurisprudence, the trial court appropriately focused on the petitioner's present condition independent of his mental illness or future medical needs.



5. Evidence submitted in the petitioner's brief fails to meet his burden of proof. The petitioner's argument that mental illness alone regardless of a standard of competency is sufficient to stay his execution is erroneous. Ambivalence is also not the test of incompetency for execution. Any reference to a "moving target" can be countered with expert testimony that petitioner's condition only improves with medication - a regime that petitioner's counsel has deliberately interrupted as a means to induce incompetency. Finally, opposing counsel's contention that Michael Owen Perry doesn't know HE is scheduled to die has been discredited with their client's own words and actions.

6. Opposing counsel is insisting that La. C.Cr.P. art. 641 is the test of competency for execution in Louisiana. This argument defies the legislative history, framers' intent, and the jurisprudence of this State. Art. 641 has never been applied as the test of competency for execution. Its purpose is to guarantee a defendant an impartial and fair trial. Hence, the application of art. 641 to the petitioner as a stay for execution defeats the State's compelling interest in finality because the petitioner has already had a fair and impartial trial. Because Louisiana has never vested the art. 641 standard in a death row inmate, the application of the Ford standard to the petitioner did not violate his 14th Amendment right.

7. The art. 641 element to "understand the proceedings" is encompassed within the Ford standard. Art. 641's second element of "assisting in his defense" is unnecessary in a post-conviction proceeding to stay execution. The additional safeguard is outweighed by the State's interests of finality and avoiding spurious claims as loopholes to execution. At this point in a condemned inmate's criminal prosecution, the question is not WHETHER he will be executed; the question is WHEN will he be executed.

8. If this Honorable Court were to rule that art. 641 is the standard of competency for execution in Louisiana, the State respectfully submits that the petitioner understands the proceedings against him and is capable of assisting in his defense. If this Court would rule Michael Owen Perry is incapable of assisting in his defense, the State respectfully suggests that the petitioner has REFUSED to assist in his defense by withdrawing from medication. The petitioner and his

counsel have attempted to manipulate the criminal justice system by abruptly halting all medication against medical advice and requesting counsel to be both medical and legal advisor. Art. 641 presumes that the "incapacity" is beyond the claimant's control; otherwise, the standard is at the mercy of the claimant.

9. Michael Owen Perry alleges that the trial court incorrectly found him competent to proceed to execution, because he was medicated at the time of judgment. The State contends that the trial court's determination of competence was a valid determination of Perry's present condition. Having determined the applicable standard of competence to proceed to execution in Louisiana being that Perry understand the death penalty and the reason for it, the trial court validly found Perry competent. It is irrelevant to this determination of competence whether the condition has been achieved or is maintained by treatment. The State asserts that Louisiana jurisprudence clearly recognizes that a determination of competence must be based on the individual's present condition only. This line of jurisprudence recognizes that competence maintained through treatment is valid competence to proceed to trial or to execution.

10. Michael Owen Perry asserts the trial court's ordering treatment was invalid as violative of State statutory and Federal Constitutional law. The State asserts that the trial court's order of treatment is valid, as consistent with both State and Federal requirements regarding treatment of death row inmates without their consent. The court's order of treatment is consistent with all state law dealing with competency determinations, deeming an assertion of incompetence acts as a submission to treatment, if treatment is necessary to achieving or maintaining competence. The order is also within the inherent power vested in courts by state law for administering the criminal justice system. In light of the intertwined nature of questions regarding competency and treatment, Federal law also requires that an individual submit to treatment if deemed necessary, or waive any objection to forcible treatment by asserting and proving incompetence. Competence maintained through treatment is valid under State law for an individual to proceed. State jurisprudence has affirmed medically maintained competence as valid to proceed to trial or to be released on probation. The same reasoning also mandates that medically maintained competence is valid so as to



allow a death row inmate to proceed to execution. Finally, the treatment order is not violative of any Constitutional rights or privileges possessed or maintained by Perry. The treatment order comports with procedural due process because it is subsumed within the protections afforded the competency determination. The order also comports with all other applicable Constitutional provisions, as satisfying the State's obligation to treat those in its custody and allowing Perry the ability to exercise his Constitutional privileges.

11. Inmate Perry claims that his hearing on competency failed to meet constitutional standards. We respectfully submit that the trial court's conduct of the hearing surpassed constitutional requirements. The Ford Court established guideposts in determining the procedures which must accompany the inquiry into competency. Perry was afforded procedural protections greater than the requirements of Ford. He was afforded the assistance of counsel; compulsory process; a right to present evidence; a right to choose sanity commission members; a right to impeach the eprerts' opinions; the privilege of an adversarial hearing; a video-taping of his testimony; an independent decisionmaker; and judicial review. The inmate's claims of trial court errors during the competency hearing lack merit.

## INTRODUCTION

Counsel for the inmate has appealed to this Honorable Court with emotional arguments that are unsupported by the laws of this state and this nation. For example, opposing counsel argued at length that "killing the insane is unconstitutional." (Pet.'s Brief, p. 25).

First, this point is moot; the United States Supreme Court settled this issue almost three years ago when it held in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) that the Eighth Amendment prohibited the execution of the insane. Prior to that time, all states recognized, either by statute or jurisprudentially, the common law prohibition against executing the insane.

Second, the State has no intention of executing an insane man, or as the opposing counsel describes it: "dragging a shaved prisoner to his death when that prisoner is delusional..." (Pet.'s Brief, pp. 26-27.) The question here is to determine the petitioner's mental competency for execution. Hence, opposing counsel's emotional arguments are a smoke screen; their main objective is to elicit emotion, confuse and mislead.

In contrast, the State has chosen to base its arguments on well-reasoned and logical premises of law. The State's legitimate interests in finality and protecting the criminal justice system from abuse and manipulation must be recognized. However, this is not to forget what has brought us to this point today. Like the petitioner's counsel, the State could just as easily flare emotions by considering the reason why this petitioner is on death row. Michael Owen Perry was the judge, jury and executioner of five innocent people; he carefully planned and carried out the murders of his parents, his 2-year-old nephew and his two cousins in the privacy of their homes. This proceeding today is just another step toward the imposition of a lawfully imposed sentence of death. The State owes a duty to its citizens to seek retribution from this condemned inmate. As Mr. Justice Stewart wrote in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs...."
>
> "...Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 96 S.Ct. at 2930.

Of course, the State's position here is not as an advocate of the death penalty. That choice was made by the State Legislature when it passed La. R.S. 14:30. However, the State does intend to argue before this Honorable Court that the petitioner, Michael Owen Perry, is competent for execution, and that he has not become insane subsequent to his conviction on October 31, 1985. Inmate Perry is mentally capable of understanding that he will forfeit his life in exchange for those lives he so violently extinguished on the peaceful morning of July 17, 1983.

I. LOUISIANA LAW PROVIDES THAT THE STANDARD OF COMPETENCY TO BE EXECUTED IS WHETHER THE CONDEMNED PRISONER UNDERSTANDS THE DEATH PENALTY AND REASON FOR IT; ONCE A VALID DEATH SENTENCE IS IMPOSED, THE DEATH ROW INMATE IS PRESUMED SANE; AND TO REBUT THAT PRESUMPTION, THE CONDEMNED PRISONER MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAS BECOME INSANE SUBSEQUENT TO HIS CONVICTION.

The State is asking this Honorable Court to unequivocally rule that the standard of competency for executing a death row inmate in Louisiana is the standard applied by the trial court to the case at bar; that is, whether the condemned inmate understands the death penalty and knows the reason he is forfeiting his life. Because of the absence of state positive law pertaining to a post-conviction standard of competency to be executed, the trial court focused on the controlling and relevant jurisprudence, most importantly, Ford, supra, and Lowenfield v. Butler, 843 F.2d 193 (5th Cir. 1988). The State is asking that the trial court's ruling be affirmed on appeal.

A. Relying on this State's jurisprudence, the trial court was correct in holding that the petitioner, condemned murderer Michael Owen Perry, is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment."

On October 21, 1988, the trial court ruled that the petitioner, death row inmate Michael Owen Perry, is competent for execution. The judge wrote:

> "The test for competency for execution in Louisiana appears to come from the Ford and Lowenfield decisions, which set forth a two-pronged test for competency for execution. Under this test, which this Court hearby (sic) adopts, the State is prohibited from executing those who are unaware of the punishment they are about to suffer and why they are to suffer it." (R. pp. 0784-85; emphasis supplied).

The trial court then went on to hold:

> "From the testimony adduced, and from the Ford and Lowenfield tests, it is obvious to this Court that the defendant is competent for execution." (R., p. 0789; emphasis supplied).

The trial court concluded its opinion by saying:



> 'For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. (R., p. 0791; emphasis supplied).

In short, the trial court's standard of competency to be executed is correct for two reasons: First, neither the State Legislature nor the state circuit courts have addressed the issue of what standard of competency is required by Louisiana prior to the execution of a death row inmate. Since the decision in Ford, supra, three years ago, the State Legislature has not acted to positively prescribe a standard by which to test competency claims of death row inmates. The State concedes a standard of insanity in the context of a post-conviction stay of execution could be more expansive than the one applied to the case at bar. Even Mr. Justice Lewis Powell, who first enunciated the Ford standard adopted by the trial court, admitted the standard is de minimus. In other words, the standard is a line below which the states could not drop without violating the inmate's Eighth Amendment right not to be executed while insane.

> "Under the circumstances, I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense. States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum." Ford, 106 S.Ct. at 2608, footnote 3.

Simply put, Louisiana has not adopted a broader definition of insanity applicable to determining a death row inmate's post-conviction competency for execution. Absent legislative action, the standard enunciated by Justice Powell should control. Therefore, the trial court was correct in applying the Ford standard.

The second reason the trial court was correct to apply the Ford standard is that the standard has been implicitly recognized in this State's jurisprudence.

The United States Court of Appeal, Fifth Circuit, in Lowenfield, supra, denied a writ of habeas corpus to condemned

murderer Leslie Lowenfield, a Louisiana inmate who has since been executed. Citing the Ford standard in dicta, the court held that the inmate Lowenfield had failed to make a "substantial threshold showing" that he presently lacked the mental capacity required for execution, and therefore, his request for a hearing was denied. Lowenfield, 843 F.2d at 187-188.

The Lowenfield court cited Ford as holding that the Eighth Amendment prohibits the execution of the insane. As authority for its denying Lowenfield a hearing, the Lowenfield court cited first Justice Marshall and then Justice Powell's concurring opinion in Ford in great detail:

> "Justice Marshall, in his plurality opinion, gives us some insight into the type of mental disorder a prisoner must suffer to be afforded this protection. Justice Marshall suggests that this relief depends on whether the prisoner 'comprehend[s] the nature of the penalty' and whether the prisoner's mental illness 'prevents him from comprehending the reasons for the penalty or its implications.'" Ford, 477 U.S. at 399, 106 S.Ct. at 2595, 91 L.Ed. 2d at 335.

The Lowenfield court then cited the standard Justice Powell articulated:

> "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied, and only if the defendant is aware that his death is approaching can he prepare himself for this passing. Accordingly, I would hold that the Eighth Amendment forbids execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 477 U.S. at 422, 106 S.Ct. at 2608-09, 91 L.Ed.2d at 354 (Powell, J., concurring in the judgment.)

After finding that "Dr. Zimmerman's affidavit does not present the substantial threshold showing that Lowenfield falls within the above-defined class of mentally deranged prisoners so that due process requires that he be afforded a hearing," the Lowenfield court again cited Ford. Lowenfield, 843 F.2d at 187.

> "In order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." Ford, 477 U.S. at 26, 106



S.Ct. at 2610, 91 L.Ed.2d at 356-57 (Powell, J., concurring in the judgment).

Dicta in other jurisprudence supports the trial court's decision as well. In the case involving this same petitioner where his conviction and sentence were affirmed on appeal, this Honorable Court in State v. Perry, 502 So.2d 543 (La. 1986) stated:

> "The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and LACKS THE CAPACITY TO UNDERSTAND THE DEATH PENALTY. (Emphasis supplied)..."
>
> * * *
>
> "...Defendant's burden is to show by a preponderance of evidence that he LACKS THE PRESENT CAPACITY TO UNDERGO EXECUTION." Perry, 502 So.2d at 564. (Emphasis supplied).

The Perry court cited State v. Allen, 204 La. 513, 15 So.2d 870 (La. 1943) for the proposition that the State would not execute an inmate who has become insane subsequent to conviction for a capital crime. The court also cited Ford, supra, as authority that no state imposes the death penalty on the insane.

In Allen, the Louisiana Supreme Court 45 years ago held that the relator, a condemned murderer who claimed post-conviction insanity, was not entitled to a hearing on the issue of his mental capacity because he had not shown a reasonable ground to believe he had become insane subsequent to conviction. Therefore, the court reasoned, the trial court's refusal to appoint a lunacy commission was not an abuse of discretion. In Allen, however, the court did not directly address the issue of what the law would require as a standard of competency to be executed. Because the relator never passed the threshold requirement to obtain a hearing, the Allen court never reached this question. However, the Allen court described how the relator's counsel had stated his client's case:

> "Counsel alleged in his application that he could prove by the sheriff, the coroner, the jailer and a certain named inmate of the jail that relator was then insane and INCAPABLE OF UNDERSTANDING THE PROCEEDINGS AGAINST HIM." (Emphasis supplied), Allen, 15 So.2d at 871.

From this review of the jurisprudence, Allen, Perry and Lowenfield all speak in terms of the condemned murderer

understanding the death penalty and reasons for it, which is the same test enunciated in Ford, supra, and adopted by the trial court. The Perry and Lowenfield decisions are particularly persuasive since the Perry court used Ford-like language and the Lowenfield court actually utilized the Ford standard, both subsequent to the Ford decision. Hence, the trial court was correct to interpret the state's jurisprudence as implicitly recognizing the standard of competency required by Ford, especially considering that the State Legislature had not yet addressed the issue.

Therefore, lacking any positive law or other jurisprudence, the trial court was correct to follow Ford, Lowenfield, Perry and Allen. For these reasons, the trial court's finding on October 21, 1988 must be affirmed. Under the Louisiana jurisprudence that has implicitly embraced the Ford standard, the petitioner is competent to be executed because he understands the death penalty and the reason for it.

B. The petitioner was found competent to stand trial and was determined sane at the commission of the crime. Under Louisiana law, he is presumed sane for execution, absent a showing by a preponderance of the evidence that he has become insane subsequent to his conviction.

The trial court's ruling was based on its own motion in the petitioner's behalf claiming that he had become insane subsequent to conviction. To inquire into the issue, the trial court appointed a sanity commission composed of three psychiatrists, Drs. Theresita G. Jimenez, Aris Cox and Glen Estes, and one psychologist, Dr. Curtis M. Vincent. Subsequently, hearings were held April 20, September 30 and October 21, 1988. From this process, the trial court concluded that the petitioner was competent to be executed because he presently comprehends the fact of his impending death, and understands why he is to be executed.

Under Louisiana law, the petitioner is presumed sane. La. R.S. 15:432 (West 1989). In Perry, supra, this Honorable Court stated that the State would not impose the death penalty if a court determined that the petitioner had become insane subsequent to his conviction. However, the petitioner would be required to carry that burden by a preponderance of the evidence. Perry, 502 S.2d at 565. Hence, the petitioner must



prove that it is more probable than not that he has become insane subsequent to his sentencing on December 19, 1985. The issue before this Honorable Court is the petitioner's PRESENT mental capacity to proceed to execution. Perry, 502 S.2d at 564.

This presumption of sanity should also be viewed in the context of this petitioner's background. During the course of his trial on five counts of first-degree murder, this same petitioner's prior sanity claims were rejected. He is now under a legally imposed sentence of death. A 12-member jury of the petitioner's peers unanimously decided during the penalty phase that the petitioner was sane at the time of commission of the crime, and, rejected any mitigating evidence of mental illness by unanimously imposing a sentence of death. Prior to trial, two sanity commissions were empaneled to review Perry's ability to assist in his defense and/or understanding of the proceedings against him. Two hearings with expert testimony were conducted, respectively on September 26, 1983 and March 1, 1985. The experts at the 1983 hearing concluded that Perry had a history of mental illness and that he was in need of further psychiatric evaluation before proceeding to trial. Each expert expressly reserved his opinion on Perry's particular mental status in 1983. In 1985, the several experts concluded that the petitioner was competent to stand trial because he understood the nature of the proceedings and was capable of assisting in his defense. The petitioner's conviction and sentence were affirmed on appeal by this Honorable Court. Perry supra. The petitioner's direct appellate review ended when the U.S. Supreme Court denied writs on October 5, and December 14, 1987. Perry v. Louisiana, 108 S.Ct. 205 (1987), cert.den., 108 S.Ct. 511 (1987), reh. den.

Because the issue of sanity has been addressed before, these prior findings that the petitioner is sane are worthy of a presumption of correctness. When this Honorable Court addresses the issue of the petitioner's present mental capacity, weight should be given to the fact that this petitioner twice before raised the same issue, and twice before lost. Hence, absent any new evidence that insanity has arisen subsequent to conviction, the result should be the same. The petitioner is competent for execution because he understands the death penalty and the reason for it.

C. Jurisprudence prohibits the petitioner from using pre-conviction evidence of mental illness to carry his burden of proving post-conviction insanity. At issue is the petitioner's PRESENT mental capacity to proceed to execution.

The petitioner must show by a preponderance of the evidence that he has become insane SUBSEQUENT to his conviction. Because the issue is now PRESENT capacity to be executed, Louisiana jurisprudence prohibits a court from considering pre-conviction evidence of mental illness to decide an issue of post-conviction competency for execution. The critical time period to determine the issue of PRESENT capacity for this petitioner is between January 20, 1988 and October 21, 1988.

Almost 92 years ago, the Louisiana Supreme Court in State ex rel. Paine v. Potts, 49 La.Ann. 1500, 22 So. 738 (La. 1897) recognized that when a defendant has raised a question of his competency prior to trial, and that issue is resolved, the issue will not be reopened and litigated again absent evidence that insanity has occurred subsequent to trial. The relator in this case was seeking a writ of mandamus to require a hearing. The relator's mental condition has been addressed by both the jury and the judge before and during the trial. The trial court subsequently denied relator's post-conviction application for a hearing. That decision was upheld on appeal because the relator had not claimed his insanity has arisen subsequent to his trial.

> "Here counsel for the defendant seek to reopen issues which were considered and passed upon in the trial of the case. We agree with the district judge. Those issues to the date of the conviction are now closed. In the application for the interdiction the insanity of the defendant is alleged, without specially averring whether it is based upon conduct and utterances of the defendant since the trial, or prior to the trial. It is well settled that, if one who has committed a capital offense becomes non compose mentis after conviction, he shall not be executed. But the burden was upon the defense to specially allege that the insanity had developed and become evident since trial..."
>
> * * *
>
> "...All allegations setting forth defendant's mental condition, having reference to a date prior to conviction, do not present an issue for decision. The allegations made do not, in our view, refer to acts of insanity since the conviction." ex rel Paine, 22 So. at 739.



Ex rel Paine was reaffirmed almost a half century later in State v. Migues, 194 La. 1081, 195 So. 545 (La. 1940), when the Louisiana Supreme Court denied writs of certiorari and mandamus to a condemned murderer who was claiming he was insane subsequent to conviction, and therefore, could not be executed. Like ex rel Paine, the court again rejected the inmate's claim because he had produced no new evidence subsequent to his conviction that he had become insane. These courts were consistent in that evidence of the defendant's mental capacity prior to conviction should not be at issue on the defendant's present claim that he had become insane subsequent to conviction.

Based on the authority of ex rel Paine and Migues, the State contends that the evidence submitted by this petitioner has failed to establish by a preponderance that he has become insane subsequent to conviction, and therefore the presumption of sanity still stands. The evidence presented to the trial court was either duplicitous of earlier evidence presented by the petitioner's counsel prior to conviction, or showed no significant change in petitioner's mental condition subsequent to his conviction.

While this court is prohibited from resting its decision on evidence that existed prior to conviction, that evidence, however, clearly provides this Court with a point of reference. Without question, this petitioner has a history of mental illness, dating back to at least 1981, some two years before the murders. The petitioner is also smart enough to malinger and smart enough to manipulate the criminal justice system. Most importantly, this mental illness did not prevent the petitioner's conviction and sentence. It should not stay his execution, absent a showing by a preponderance of the evidence that his mental illness has deteriorated to the point of legal insanity. The State contends that the evidence clearly indicates that the petitioner is the same today as he was pre-trial, and therefore his condition remains unchanged. The evidence further shows that the petitioner satisfies the legal test of competency to be executed: He is aware of his impending death and the reason for it.

In conclusion, the petitioner has failed in his burden of proof, and therefore, the trial court ruling on October 21, 1988 must be affirmed.

II. LOUISIANA'S STANDARD OF COMPETENCY TO BE EXECUTED WAS FIRST ENUNCIATED ALMOST THREE YEARS AGO IN UNITED STATES SUPREME COURT JUSTICE LEWIS POWELL'S CONCURRING OPINION TO FORD V. WAINWRIGHT. IF A DEATH ROW INMATE KNOWS OF HIS IMPENDING DEATH AND THE REASON FOR IT, THE STATES ARE FREE TO IMPOSE THE SENTENCE OF DEATH.

For the first time, the United States Supreme Court in Ford, supra, recognized an Eighth Amendment right not to be executed while insane. But while the States would be prohibited from executing insane inmates, they were not told by a clear majority what the standard of competency to be executed would be. Subsequently, any post-Ford analysis rests heavily on Justice Lewis Powell's concurring opinion, where, for the first time, the issue was directly addressed.

A. Justice Powell's two-prong test defines sanity in the context in which it arises, that is, subsequent to conviction.

Mr. Justice Powell stated in Ford that he wrote his concurring opinion to address two issues: "(i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of de novo review in federal courts under 28 U.S.C. §2254(d)." He explained: "The Court's opinion does not address the first of these issues, and as to the second, my views differ substantially from Justice Marshall's. I therefore write separately." Ford, 106 S.Ct. at 2606-07.

Justice Powell had joined only Parts I and II of Justice Marshall's plurality opinion, in which Justice Marshall was joined by Justices Brennan, Blackmun and Stevens. Justice Powell agreed with the plurality that executing an insane prisoner was cruel and unusual punishment under the Eighth Amendment. While Justice Marshall said the States would be prohibited under the Eighth Amendment from executing the insane, his plurality opinion left open the issue of how a state was to determine when a prisoner's mental incapacity was sufficient to stay his execution. Justice Marshall wrote:

> "We leave to the States the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." Ford, 106 S.Ct. at 2606.



Justice Powell, however, explained in great detail what "mental awareness" the Eighth Amendment would require as a prerequisite to execution. He summarized his position as follows:

> "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 106 S.Ct. at 2608.

While states were left free to pass more expansive standards, Justice Powell enunciated the constitutional minimum. Justice Powell's test is essentially two-pronged: first, the death row inmate must know the fact of his impending death; second, the inmate must know the reason for it. If this test is met, the states are then free to execute the inmate.

Support for Justice Powell's standard is also found in Justice Marshall's plurality opinion. While Justices Powell and Marshall hold different views as to the procedural safeguards needed to protect an insane inmate's substantive right under the Eighth Amendment, they speak in similar terms as to the standard. In dicta concerning procedural safeguards, Justice Marshall stated:

> "Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the 'evidence' will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that 'evidence' be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ABILITY TO COMPREHEND THE NATURE OF THE PENALTY. Fidelity to these principles is the solemn obligation of a civilized society."
>
> "Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from COMPREHENDING THE REASONS FOR THE PENALTY OR ITS IMPLICATIONS." Ford, 106 S.Ct. at 2606. (Emphasis supplied).

Most recently, Justices Marshall and Brennan, both well-known, adamant opponents of the death penalty, referred to Justice Powell's standard in their dissenting opinion in Johnson v. Cabana, 107 S.Ct. 2207 (1987). The majority had denied the petitioner's application for a stay of execution and his petition for a writ of certiorari. Arguing that the application for a stay and the petition for certiorari should be granted, Justice Brennan, with whom Justice Marshall joined, wrote the dissenting opinion.

Justice Brennan stated that the petitioner had raised a substantial claim that he had become insane subsequent to his conviction, and therefore, under Ford, could not be subjected to execution. Justice Brennan then cited Justice Powell's concurring opinion in Ford as establishing a two-prong test.

Hence, the three justices appear to agree on the definition of insanity in the context of staying a death row inmate's execution. Justices Powell, Marshall and Brennan all require that the condemned prisoner know of his impending death, so he can prepare mentally for its occurrence. They also require that the condemned prisoner know why he is being executed, so that the retributive value of the death penalty is served.

This Honorable Court will find that the evidence clearly shows that the petitioner, Michael Owen Perry, is aware of his impending death, and therefore, society is affording him an opportunity to prepare himself. The petitioner is also aware that he is being electrocuted because he murdered five members of his family. Therefore, under the authority of Ford, the petitioner is legally competent to be executed, and the State may impose the penalty of death.

B. The standard announced by Justice Powell in Ford is the prevailing standard used by the states that have adopted a death penalty.

As stated earlier, Justice Powell was well aware that the standard he held was necessary under the Eighth Amendment was a minimal standard, and he reminded state legislators that they were free to pass statutes encompassing more expansive standards. However, Justice Powell suggested that the standard he proposed was one already recognized jurisprudentially in the majority of the states with a death penalty. In Ford, Florida



had by statute granted death row inmates a right not to be executed while insane. While the standard was basically the same standard as proposed by Justice Powell, the state's procedures for determining the inmate's competency were held constitutionally deficient. In a footnote, Justice Powell pointed out his standard was the one most favored:

> "Moreover, other cases suggest that the prevailing test is 'whether the condemned man was aware of his conviction and the nature of his impending fate' - essentially the same test stated by Florida's statute." Ford, 106 S.Ct. at 2608.

Louisiana, therefore, has followed the majority rule on this issue. As Justice Powell pointed out at the time Ford was written, most states had not addressed the issue in their positive law, but had adopted the standard in their case law. Hence, by Louisiana implicitly recognizing the Ford standard in its jurisprudence, the state is following the majority trend.

C. The Ford standard is very similar to a standard recognized at common law. Prior to 1966, Louisiana's Code of Criminal Procedure required courts to supplement its criminal law with common law whenever gaps in the Code were found.

All states recognized the common law prohibition against executing the insane long before the Ford decision in 1986. In Louisiana's history, one of the earliest cases to address the issue was State ex rel. Armstrong v. Judge, 48 La. Ann. 503, 19 So. 475 (La. 1896). Although the 1943 Louisiana Supreme Court case of Allen, supra, is generally cited for the proposition that Louisiana will not execute an insane prisoner, by the time Allen was decided, that principal was already well established in Louisiana law. For instance, ex rel. Armstrong, just short of a century old, held that a convicted murderer sentenced to death by hanging was not entitled to jury trial on his post-conviction insanity claim. In that case, the judge had appointed a commission of three experts to examine the relator. Two ruled that the man was sane; the third expert said the relator was "affected with emotional insanity." Ex rel Armstrong, 48 La. Ann. at 504. In 1897 the Louisiana Supreme Court in ex rel Paine, supra, expressly stated:

> "It is well settled that, if one who has committed a capital offense becomes non compose mentis after conviction, he shall not be executed." ex rel Paine, 22 So. at 739.

So, while it is clear that Louisiana followed the common law prohibition against executing the insane, it is not clear what standard of competency the courts were applying. The State's research on a standard of competency for a post-conviction stay of execution failed to uncover any late 19th century or early 20th century case where the court discussed the standard that was applicable. While a series of cases discussed other related issues, such as whether the trial court abused its discretion in denying the condemned inmate a hearing, whether the condemned inmate was entitled to a jury trial, or whether evidence of pre-trial insanity could be reconsidered for post-trial insanity claims, no case was found that directly addressed the issue of what standard would be applied if the prisoner had met his threshold burden of proof.

However, Louisiana's Code of Criminal Procedure prior to 1966 required the courts to follow the common law to fill gaps in the law if no codal provisions was applicable. (See La. C.Cr.P. art. 3, (West 1989), Official Revision Comment.) This approach has since been abandoned with the adoption of La. C.Cr.P. art. 3. However, this would seem to indicate that prior to 1966, a Louisiana court was required by the Code to supplement procedural gaps by relying on the common law. Therefore, a Louisiana court would have been required by the Code to apply a common law competency standard provided that the State's positive law or jurisprudence had not addressed the issue.

The State's research also uncovered a common law standard of competency that is very close to the standard enunciated in Ford. LaFave & Scott point out that while the common law prohibition against executing the insane was well understood, the policy issues supporting the rule were muddled and confused. Despite the confusion, a standard of competency prior to execution was recognized. The commentators stated:

> "It is the rule in all jurisdictions that a sentence of execution cannot be carried out if the prisoner is insane at the time set for execution. The common law was quite vague on the meaning of insanity in this context, but it is unusually taken to mean that the defendant cannot be executed if he is UNAWARE OF THE FACT THAT HE HAS BEEN CONVICTED AND THAT HE IS TO BE EXECUTED. Stated another way, he must be so unsound mentally 'AS TO BE INCAPABLE OF UNDERSTANDING THE NATURE AND PURPOSE OF THE PUNISHMENT ABOUT TO BE EXECUTED UPON HIM.' Whether this is a correct or complete statement of the rule remains somewhat unclear because of continuing uncertainty about the reasons underlying it." LaFave & Scott, 4:39 at 302-03 (Emphasis supplied.)



Therefore, after adopting the common law rule prohibiting the execution of the insane in its jurisprudence, Louisiana prior to 1966 would also have adopted the common law standard of competency if it was needed as a means to implement the rule. Historically speaking, Louisiana was authorized to recognize a Ford-like standard some 20 years before Ford was written.

D. Louisiana has embraced the Ford standard implicitly by the dictum of Lowenfield v. Butler, State v. Perry and State v. Allen.

As was previously argued, Louisiana has implicitly recognized the Ford standard in Lowenfield v. Butler and Perry, supra. The Fifth Circuit in Lowenfield quoted the Ford test extensively, and Perry, in dicta, referred to the standard as "lacking the capacity to understand the death penalty." Perry, 502 So.2d at 564. The Allen case, supra, also framed the question as whether the relator was "incapable of understanding the proceedings against him." Allen, 15 So.2d at 871.

Independent of this jurisprudence, the State has also pointed out that Louisiana was also required by the Code prior to 1966 to borrow from the common law when necessary. Therefore, an argument can be made that Louisiana would have used a common law standard to implement its jurisprudence, which, since the 19th century, had embraced the common law prohibition against executing the insane. In other words, the promise of Allen could have been delivered with the common law standard as described by LaFave & Scott.

III. THE FORD STANDARD IS DESIGNED TO FURTHER THE PRIMARY PURPOSES OF THE DEATH PENALTY, WHICH MOST COMMENTATORS AGREE ARE RETRIBUTION AND DETERRENCE. AT THE SAME TIME, THE STANDARD RECOGNIZES THE DEATH ROW INMATE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND UNDER LA. CONST. ART. 1, §20.

> "Virtually all of the commentators who have examined the issue have agreed that the test for insanity should be tailored to the purposes of the rule. For example, if the reason for the rule against executing the insane is to ensure that the condemned prisoner has every opportunity to explain why he should not be executed, then the test of insanity should be whether the prisoner has the faculties to think of such a reason and the ability to communicate it to a lawyer. If, however, the purpose of the rule is to let the condemned make his peace with God, then recognition of the moral reprehensiveness of the crime that was committed should be the decisive factor. Alternatively, if the rationale for the rule is that 'he who since must suffer,' then the prisoner must be able to appreciate his impending fate." Pastroff, 77 J. of Crim. Law & Criminology, at 864.

Up to this point, the State has concentrated on why the standard of competency to be executed in Louisiana is the Ford standard. Now the State would like to examine the underlying purposes of the Ford standard. As Justice Powell himself stated, the standard was designed to address insanity in the context in which it arises, that is, subsequent to conviction. In a sense, the standard is a screening mechanism to see that the inmate's constitutional rights are protected, and yet at the same time, to ensure that the purposes of the death penalty are served.

A. The Ford standard supports the Eighth Amendment by staying the execution of an insane inmate.

Commentator Schultz, 20 Creighton L.R. 867, 874, stated that the death penalty serves two principal social purposes: retribution and deterrence. She wrote:

> "In deciding whether the execution of the insane is constitutional, courts must consider to what extent these purposes of the death penalty are defeated, if at all, by the fact of the prisoner's post-conviction insanity." 20 Creighton L.R. at 875.



In his concurring opinion, Justice Powell disregarded many of the early day reasons said to underlie the common law rule of not executing the insane. For example, while Blackstone would have required a defendant to possess the capability of making arguments in his behalf, Justice Powell stated in response:

> "These guarantees (modern day appeals and collateral review of convictions and sentences) are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." Ford, 105 S.Ct. at 2608.

However, Justice Powell seems to adopt the early day common law belief that execution of the insane was cruel. He stated:

> "It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally." Ford, 105 S.Ct. at 2608.

Justice Powell stated that requiring the death row inmate to know of his impending death and the reason for it protected that inmate's rights under the Eighth Amendment.

> "A number of States [Mississippi, Missouri and Utah] have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.
>
> Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition." Ford, 105 S.Ct. at 2608.

In Ford, death row inmate Alvin Ford had proffered a psychiatric examination claiming that he believed his death sentence had been invalidated. Justice Powell said that if Ford could prove his assertion that HE was unaware of his impending death, then the Eighth Amendment would require a stay of execution. Therefore, the standard would ensure that the inmate's Eighth Amendment right was not violated because he would be given time to prepare for his death, and he would know the reason his life was being extinguished.

B. Applying the Ford standard of competency to the case at bar did not violate the petitioner's rights under the Fourteenth Amendment. By using the Ford standard, Louisiana has fulfilled its promises under Allen and ex rel Paine not to execute the insane.

The petitioner's counsel has argued to this Honorable Court that the trial court erred by applying the Ford standard because Louisiana had vested a greater liberty interest in the petitioner than required by the United States Constitution.

The State will explore this issue in greater detail in Argument VI, D, infra. For now, it suffices to say that the petitioner's argument lacks merit for two reasons.

First, the majority of Ford (Justices Marshall, Brennan, Steven, Blackmun and Powell) agreed that source of this right not to be executed while insane stemmed from the Eighth Amendment. Hence, according to the majority view, this petitioner's reliance on the Fourteenth Amendment is misplaced.

Second, the laws of this State never vested such a right in the petitioner. In contrast to the Ford majority that the Eighth Amendment prohibited the execution of the insane, Justices O'Connor, White and Rehnquist disagreed, and stated that neither the Eighth nor Fourteenth Amendments gave the inmate such a right.

However, Justice O'Connor, with whom Justice White concurred, stated that Florida law had instead created a right under the Fourteenth Amendment not to be executed while insane. She said:

> "With Justice Rehnquist, I agree that the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency. The relevant provision of the Florida code, however, provides that the Governor 'SHALL' have the prisoner committed to a 'Department of Corrections mental health treatment facility' if the prisoner 'does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him.' Our cases leave no doubt that where a statute indicates with 'LANGUAGE OF AN UNMISTAKABLE MANDATORY CHARACTER' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." Ford, 106 S.Ct. at 26[illegible]-12. (Citations omitted; emphasis supplied).



In Ford, a Florida statute had governed the determination of a death row inmate's competency to be executed. The Florida law was "language of an unmistakable mandatory character," Hewitt v. Helms, 459 U.S. at 471-72 (1983), and thereby had vested a protected liberty interest in the death row inmate. In contrast to the Florida statute, there is no positive law in Louisiana governing post-conviction competency proceedings to settle claims of incompetency to be executed. Without "language of an unmistakable mandatory character" in a Louisiana statute, the petitioner's claim that his Fourteenth Amendment due process rights have been violated in without merit.

In Louisiana, the jurisprudence has embraced the common law rule prohibiting the execution of insane inmates. The trial court, by applying the Ford standard in absence of positive law, has fulfilled the State's promise under Allen and in re Paine not to execute the insane. Because the petitioner understands the death penalty and reason for it, he is competent to be executed. Because he meets the legal test recognized in Louisiana, his execution does not violate either the Eighth or Fourteenth Amendments.

C. The Ford standard satisfies the requirement of La. Const. art. 1, §20 requirement that the punishment not be "excessive."

The petitioner's counsel has argued to this Honorable Court that by using the Ford standard, the trial court violated the petitioner's right under La. Const. art. 1, §20, which prohibits cruel, excessive or unusual punishment.

First of all, Louisiana's addition of the word "excessive" to its Constitution does not expand a citizen's substantive right as guaranteed by the Eighth Amendment itself, which uses only the words cruel and unusual. The late Justice Tate, in State v. Sepulvado, 367 So.2d 762 (La. 1979) addressed Louisiana's use of the term "excessive" in great detail, and summarized that art. 1, §20 provided each convicted person a chance for judicial review on the facts of his sentence to determine whether or not the punishment, although within the statutory limits, was "excessive" as applied to THIS DEFENDANT.

In Sepulvado, the Court had held that under art. 1, §20, the imposition of a 3 1/2 year term of imprisonment at

hard labor for an 18-year-old, first-time offender for carnal knowledge of a juvenile was "excessive" and thereby unconstitutional. Evidence showed that the defendant had a job, a family and was unlikely to become a repeat offender.

Justice Tate stated:

> "The deliberate inclusion of a prohibition against 'excessive' as well as 'cruel and unusual punishment' adds an additional constitutional dimension to judicial imposition and review of sentences. By it, the excessiveness of a sentence becomes a question of law reviewable under the appellate jurisdiction of his court. See La. Const. art. 5, §5(C)." Sepulvado, 367 So.2d at 764 (Emphasis supplied).

In comparison, Justice Tate explained:

> "The Eighth Amendment to the federal constitution prohibits 'cruel and unusual' punishments. It was long ago held that excessiveness was a factor to be considered in determining whether a punishment was within the constitutional prohibition of that clause...However, later cases gradually subsumed the excessiveness element within the other, more liberal tests for determining whether the "cruel and unusual" standard was violated, giving rise to a general rule against appellate review for excessiveness per se." Sepulvado, 367 So.2d at 764-65. (Citations omitted).

In other words, under the old Louisiana Constitution of 1921, the Supreme Court declined to review sentences for excessiveness. Under the new Constitution of 1974 art. 1, §20, the Court was mandated to do so.

Since the Sepulvado opinion in 1979, the U.S. Supreme Court had adopted a similar approach in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). There the U.S. Supreme Court held that a punishment under the Eighth Amendment must be in proportion to the severity of the crime, and that no penalty was per se constitutional. The Court had found that a sentence of life imprisonment without parole imposed upon a defendant who was convicted of a bad check charge was disproportionate despite the defendant's past criminal activity.

In this case at bar, the petitioner's death sentence has already been reviewed for excessiveness, as required by this Honorable Court under La. C.Cr.P. art. 905.9. In Perry, supra, this Court decided that a death penalty based on two aggravating circumstances imposed upon this petitioner was not excessive.

IV. THE TRIAL COURT PROPERLY FOCUSED ON THE PETITIONER'S PRESENT CAPACITY BY CONCLUDING HE IS COMPETENT TO BE EXECUTED; BOTH THE PETITIONER'S OWN ACTIONS AND EXPERT TESTIMONY SHOW THAT HE IS COMPETENT TO BE EXECUTED; PETITIONER'S ACTIONS AND THE TESTIMONY CLEARLY REVEAL THAT HE UNDERSTANDS THE DEATH PENALTY AND THE REASON FOR IT.

At this point, the State suggests that the facts of this case conclusively prove that the petitioner is competent to be executed. This Honorable Court in State v. Perry, supra, required that the trial judge himself make the decision of competency for execution.

> "We stress that the determination of defendant's sanity is for the trial judge, not a sanity commission alone." Perry, 502 So.2d at 564.

The trial judge in this matter heard the expert witnesses testify at three separate hearings, as well as questioned them. He read and received all medical reports. Absent an abuse of discretion, the trial court's ruling that the petitioner Michael Owen Perry is competent to be executed should stand.

A. The trial court correctly focused on the petitioner's PRESENT mental capacity to proceed to execution independent of his mental illness or future medical needs.

In determining the petitioner's PRESENT mental capacity, the trial court properly focused on the petitioner's PRESENT condition between the period of January 20, 1988 and October 21, 1988. This approach is consistent with the State's jurisprudence.

In State v. Hampton, 218 So.2d 311 (La. 1969), the Louisiana Supreme Court ruled that a defendant whose mental capacity was maintained through the use of prescription drugs was competent to stand trial. The defendant in this case was diagnosed as suffering from chronic paranoid schizophrenia. Even though there was testimony to indicate that the defendant's competency might relapse if she was taken off the psychotropic medication, the court stated that the medication was of "no legal consequence." The trial court in the case at bar quoted from Hampton for this proposition:



> "...that this condition has resulted from the use of a prescribed tranquilizing medication is of no legal consequence. Under the codal test, the court looks to the CONDITION ONLY. It does not look beyond existing competency and erase improvement produced by medical science..." (R., p. 0775) (Quoting from Hampton, supra, at 312, emphasis supplied).

In other words, the fact that the petitioner's mental state improves with medication, or that medication contributes to the petitioner's competency, is not legally relevant. The focus of the proceeding is on the petitioner's PRESENT CAPACITY. Therefore, the trial court's ruling concerning medication to ensure the petitioner's competency at some future date was separate and apart from its ruling that the petitioner was PRESENTLY competent to be executed. (R., p. 0005)

B. Petitioner understands that he faces the death penalty because he murdered five members of his family, and he knows he will die if electrocuted.

The State contends that the petitioner, Michael Owen Perry, by his own words and actions, clearly establishes that he understands the death penalty and that he knows why his life will end in the state's electric chair.

The testimony concerning Perry's own words and actions is especially critical to this Honorable Court for two reasons: First, it proves conclusively that the petitioner understands the death penalty and reason for it. Therefore, he is competent for execution.

Second, the testimony concerning Perry's own words and actions shows a scheme between the petitioner and his counsel to induce a calculated insanity. In other words, by voluntarily refusing medication, the petitioner may become insane, and thereby, win a stay of execution. Even though the scheme condemns the petitioner to a life of insanity, petitioner's counsel will also achieve its primary goal: Oppose the death penalty at all costs.

Hence, the evidence shows conclusively that the petitioner is keenly aware of his impending fate: he foresees his death in the electric chair. Dr. Kovac's testimony, infra, also reveals that the petitioner and his counsel are manipulating the criminal justice system. The petitioner may not know of Ford v. Wainwright, supra, but he does know that crazy men are not executed.

(i) Dr. Jiminez' testimony:

Dr. Jimenez' testimony also supports the trial court's finding that the petitioner is aware of his impending death and the reason for it. Dr. Jimenez, who first met the petitioner in 1983 while he was a patient at the Feliciana Forensic Facility, testified that the petitioner is capable of understanding the death penalty. Dr. Jimenez testified at both the April 20 and the October 21, 1988 hearings.

[By the Court:]

Q: *** Now in your letter addressed to me dated March 10th of '88 you say he does understand that he is convicted and also expressed that he does not want to die. So my question is is he aware of the punishment that he has been ordered to suffer and does he understand why he had been ordered to suffer that punishment?

A. Yes sir, he said, uh, when I first went to talk to him he said he was scared to die, he killed his mother because he was angry. And he asked me to help him be able to live.

Q. So...

A. So he does understand that he's convicted of the death of his family and he does understand that the penalty is death.

Q. And does he understand that he is going to suffer that penalty because of his actions?

A. I think if he knows that he's being -- he's dying because he killed his parents, I think he could understand that that's the result -- that his death is the result of the actions that he did.

Q. Okay, thank you."

(R., p. 0525-26; emphasis supplied).

[By Mr. Salomon:]

Q. Now, as the judge explained to you a moment ago, Dr. Jimenez, that your report mentioned the Bennett criteria but the Bennett criteria is not exactly the criteria upon which we are basing today's determination.

A. That's true.

Q. All right. Now what is important to today's determination are some of the following questions, and please answer them to the best of your ability. Is it not true that Mr. Perry expressed to you he did not wish to die?

A. That's true.



Q. Is it not true that he understood his sentence, the death penalty?

A. Yes, sir.

Q. Now when we say he understood his sentence, the death penalty, how were you able to conclude hat he understood it? What component of it did he understand? What was it you explained or did he ask questions of you?

A. The first thing Mr. Perry said to me when I went to see him was, uh, I asked him if he remembered me and he said he did. And I said, do you know why I am here. And he said to me, you are here to help me stay alive, is what he said to me. And I said, why did you say that. And so we started talking about what his present condition and about what he had done that ended up in his incarceration and the penalty that he had. So that's when he first told me that he did not kill the family, that somebody else killed them, in fact, that man that killed them also had taken a shot at him in the head. Then at the later part of the interview that's when he said at the end that he was very angry with his mother and called her all kinds of names. And he said that the little boy was also a bastard and that his sister was insane. He started being derogative towards the family and stated that he did kill them. So he does understand that he killed them and that he is scared to die. So I say yes to those last questions that you asked. My apprehension with him is he does get ambivalent and he knows -- he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness.

(R., pp. 0530-31; emphasis supplied).

Dr. Jimenez' testimony also shows that the petitioner knows he is being electrocuted because he murdered his parents, his nephew and two cousins.

[By Mr. Salomon:]

Q. And can you see my distinction? Is it possible that Michael's ambivalence, as you term it, is more in line with a refusal to cooperate, a refusal to assist, rather than, as you put it, he is unable to assist?

A. There is a certain degree of refusal and there's also a certain degree of inability. It's very difficult, and that's the reason why I suggested that I would feel more comfortable if this man were better medicated and better, uh, in a better frame of mind than he is now. Although he does understand that he killed his family and he does understand that he is getting the chair for that crime.

Q. Okay. And you have made those determinations pursuant to your interview that he understands why he's being penalized why he incurs and he going to suffer the penalty of death?

A. Yes, sir, based on my evaluation that's the conclusion I arrived at.

(R., pp. 0533-34; emphasis supplied).

Of the four expert witnesses, Dr. Jimenez' testimony is worthy of the most weight. She was a member of the review team prior to the petitioner's trial, and therefore, she can best address the petitioner's pre-trial competency as compared against his post-conviction competency. Three experts (Drs. Jimenez, Cox and Vincent) agree that the petitioner suffers from a mental illness called Schizoaffective Disorder. Drs. Jimenez and Vincent testified the petitioner's diagnosis is unchanged.

[By Mr. Salomon:]

Q. Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A. No, sir.

Q. The symptoms appear to be the same? They're consistent from your first consultation or observations through to your most recent?

A. Well, I had seen Mr. Perry in a better frame of mind.

Q. By frame of mind you mean what? More cooperative? Less hostile?

A. Yes. And he was able to participate more in interviews. I haven't seen him for two years until I saw him agains.

Q. And when you first encountered him after two years did you not testify a moment ago that he recognized you?

A. Yes.

Q. He remembered you? He knew what significance you had in his life?

A. Yes, sir.

(R., pp. 0534-35.)

In September 1988, Dr. Jimenez returned to Angola at the trial court's request to re-examine Mr. Perry. She testified:

[By the Court:]



A. I went to the State Penitentiary to the death row and I saw him there, where he's currently being a resident, or an inmate. I talked to him regarding his -- the reason why he's incarcerated, and what possible -- what, what is the conviction that he had. And he was able to indicate to me that he was there because he was convicted of first degree murder of five people and that he was going to be executed because of this.

Q. Now, were you aware of the fact that he had had an injection of, ah, what I'll call, ah, the long-term, long-affecting Haldol on September 3rd?

A. Yes, sir, I did. He received Haldol Decanoate 2 CC IM September the 3rd, 1988. He had been sporadically taking his medication. Apparently, after that, the Haldol by mouth, but three days before I saw him he had completely refused to take his medication by mouth.

Q. Now, my notes indicate that he was given oral short-term Haldol on September 11th, which would have been two days before your September 13th examination, do your notes reflect that?

A. What I have, sir, is that Haldol ten Milligrams, refusing very often, took once in three days; that would be pretty close, what you have.

Q. And at the time that you saw him on September 13th, was he psychotic?

A. No, sir. He was pretty stable, based on my examination and evaluation.

Q. All right. Let's move on to September 26th, did your examination take place in the same area of the prison?

A. Yes, sir. The same place, and I asked him the same questions, and he told me that I've asked those questions several other times in the past. And, again, I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him, and he was able to do so.

Q. Was he psychotic on September 26th, in your opinion?

A. No, sir, he was not.

Q. And at that time, his last medication injection would still have been September 3rd, is that correct?

A. That's right, sir.

Q. And at that time, on September 26th, did he understand that he was facing the death penalty?

A. Yes, sir. He said: Five counts of murder. I already told you that. That penalty, electric chair for first degree murder.

Q. Did you have a discussion with him about whether or not he was going to take his medication or not?

A. Yes, Sir. He said that he was told by h's lawyer not to take his medicine, the judge wants me to take the medicine so I could be executed. My lawyers, ah, you have you said you have, ah, my lawyers said you have a famous case here, it might go to the U.S. Supreme Court, is what he said.

(R., pp. 0753-54; emphasis supplied).

This latest testimony by Dr. Jimenez, given October 21, 1988, indicates that the petitioner knows exactly why he's on death row. The testimony reveals that the petitioner is keenly aware of the legal process, shown by his reference to the United States Supreme Court. Dr. Jimenez' testimony also corroborates Dr. Kovac's earlier testimony on September 30, 1988, infra, that the petitioner is working in conjunction with his attorneys to refuse medication, and thereby, induce insanity and postpone execution.

Another telling piece of evidence concerning the petitioner's competency to be executed is revealed by Dr. Jimenez' testimony concerning her conversation with the petitioner about his watching the Geraldo talk show. The petitioner not only could recall the events that had occurred, but he related his personal life experiences to those of mass murderer, Charles Manson.

[By Mr. Salomon:]

Q. And could you describe for us his orientation on both of those days of interviews?

A. Yes, sir. He was aware of where he was at. He was aware that it was the month of September. And he didn't exactly know the date, but he was aware that it's September and 1988. He talked about things that he had seen. I asked him what -- how he usually spent his time, and sometimes, he said, just lying in bed sometimes, or sometimes he watched the t.v. show, and he talk about having seen a program about Charles Manson, and he was -- he voiced some concerns about the picture and his opinions about that show.

Q. Okay. Did he indicate, I mean, what show it was he was watching and why it concerned him?

A. It was about a show by Geraldo, and it was on Charles Manson, and he was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed and why, why he, who only killed five people should be executed.

(R., p. 0758; emphasis supplied).

Not only can the petitioner relate to Charles Manson, he is also keenly aware of his impending death.



[By Mr. Salomon:]

Q. Do you recall on -- did he express to you any wishes or information on how he felt concerning his penalty of death that he faces?

A. He told me that when first he was told that he was going to die, he said, well, I'm going to die, I'm going to die, but he told me that as the time come closer, he starts feeling scared. In fact, he said: I'm scared, scared to die. And he, during my last visit had -- I expressed to him how I feel about having to go there so often to evaluate him, I said: It's not really a pleasure coming here talking to you all the time and asking you these things. And he said: Don't feel bad about it, you're just doing your job, and he said that he does not think about dying because it drives him crazy to think about, about that.

(R., pp. 0759-60; emphasis supplied).

In arguments to the trial court, Mr. Rene Salomon, on behalf of the State, explained the importance of petitioner's reference to the Charles Manson program.

[By Mr. Salomon:]

All right. Your Honor, if I might, there are a couple of points that I want to reiterate, recapitulate, not so much, but more iterate for you, is that according to what Dr. Jimenez just said on this witness stand this morning, I think it's important to recognize that a couple of statements Mr. Perry made emphasize the satisfaction of the Ford versus Wainwright criteria which is at issue here today. First, take the statement that Mr. Perry says I saw the Manson program, I saw what Geraldo had to say to him and why do I have to die when he's committed more, been involved in more murders than I. I feel that that is significant and quite pertinent and relevant, for it demonstrates his recall of the events that happened some eight/nine/ten months ago. It indicates an ability to comprehend and understand what he viewed on the television set, and it indicates his ability to not only comprehend and digest that information, but to talk about it in his own terms on a personal level in relation to himself a matter of months later. And I would also submit that the way Charles Manson acted on that program could have influenced the behavior of Mr. Perry at subsequent dates and times, as when he was being video-taped on April the 20th of 1988. The fact that in his recent interviews with Dr. Jimenez, he expressed a fear of dying, and that it has increased, so-to-speak, as time marches forward toward his ultimate fate. That tells me that he has some recognition of the circumstances surrounding himself and the events that are out of his control at the present.

(R., pp. 0764-65; emphasis supplied).

In conclusion, the testimony recited above conclusively proves that the petitioner, in his own words and by his own actions, has shown that he is competent to be executed. Applying the Ford standard, Michael Owen Perry knows he faces death in the electric chair. He also knows why: because he murdered five members of his family. Hence, under Ford he is competent to be executed.

The evidence also shows the petitioner's capacity exceeds the Ford minimum. Michael Owen Perry is keen enough to realize the U.S. Supreme Court is the ultimate arbitrator in the land. He knows he will die if electrocuted, and he is afraid of that death. Subsequently, he has worked together with his counsel to refuse medication. Dr. Kovac's testimony, fnfra, and Dr. Jimenez' testimony supra, reveal a scheme by the petitioner and his counsel to manipulate the criminal justice system. These are planned and calculated decisions; just as the murders were planned and calculated.

C. Expert testimony of three experts reveal that the inmate understands that he will die in the electric chair for the five murders he committed. The inmate clearly knows of his impending death and the reason for it.

Expert testimony supports the trial court ruling that the inmate, even without medication, knows of his impending death and the reason for it.

As stated, supra, Dr. Jimenez' testimony clearly establishes that the petitioner is competent to be executed. Michael Owen Perry told the doctor he was scheduled to be executed because he had murdered five people. (R., pp. 0753-54,0758) Dr. Jimenez gave similar testimony at the April 20, 1988 hearing, supra.

(ii.) Dr. Cox's testimony:

Dr. Cox's testimony coincides with Dr. Jimenez' findings that the petitioner understands he is to be electrocuted for murdering five members of his family, and yet it goes even further. Dr. Cox testified at the September 30, 1988 hearing that even at the petitioner's worst moments, the petitioner still satisfies the Ford criteria.



[By The Court:]

Q. As best you can recall, would you explain or tell us exactly what you did and how Mr. Perry appeared and how the conversation went?

A. I pretty much had the standard conversation I had with Mr. Perry when I see him. I asked him how he was doing, uh, again went into his circumstances with him, asked him to talk to me about his situation.

Q. What do you mean by circumstances and situation?

A. His awareness -- well, number one, how he's doing, day to day how he's feeling, what's going on with him, etcetera. I specifically asked him -- I was told the weekend before I saw him, he had been upset and I had to go to the hospital for an emergency injection of medication. I questioned him about that. I then talked with him about his understanding of his position on death row, why he was there and the implications of his situation. Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me he had been having hallucinations, voices, as he described it, over the weekend which had bothered him and that caused him to create to outbursts that led to him going to the hospital. I noticed several times during the interview when discussing his situation, his possible execution, the crimes for which he was convicted, he burst into periods of laughter which would interrupt our conversation. And I'd wait for him to compose himself and then he would start talking again. His thought processes were disorganized. He indicated to me that he was still hallucinating. My conclusion was that he was getting worse, even on medication. And I suggested to the staff that the dosage of medication would have to be increased. It was my impression, however, that he was aware of the fact that he was under a sentence of death, and that the process of electrocution could kill him and that he was aware of why he was on death row. As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the Bennett criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation.

(R., pp. 0737-38; emphasis supplied).

On cross-examination by Mr. Salomon in the State's behalf, Dr. Cox reiterated his position.

"I directly asked him if electrocution would kill him and he said yes, he knew it would. I asked him if he understood that he was under a sentence of death, if that was his understanding and he said yes.

(R., p. 0745).

In his first court appearance on April 20, 1988, Dr. Cox testified that the petitioner was competent to be executed.

On redirect questioning by the petitioner's attorney, Mr. Nordyke, Dr. Cox stated his opinion.

[BY Mr. Nordyke:]

Q. Have you formulated an opinion as to whether or not Mr. Perry is competent to be executed?

A. Well, as you and I have discussed before, that's a relative thing. It has to do with the treatment Mr. Perry is receiving. I have seen him at times when I did not feel he was competent to be executed. I have seen him also at times when I thought he was competent to be executed.

Q. Is there any way of predicting when he is competent?

A. When I saw him the last time which was on the 3rd of March he was on neuroleptic medication. He was about as -- he was functioning about as well then as I've ever seen him function. At that time I went through the whole matter with him and he was aware of why he -- of where he was, what his sentence was, what he would be executed for and was aware of the fact that he could be executed. He was taking Haldol at that time.

(R., pp. 0550-51; emphasis supplied).

Dr. Cox reiterated the same position under questioning from the trial court.

[By The Court:]

Q. Because I'm not certain at this point what tests the appellate courts might ultimately set forth to guide this Court, the test for legal sanity on the issue of guilt or innocence at a trial, is the ability to distinguish right from wrong...

A. Yes, sir.

Q. ...based on your examination of him on March 3rd, 1988 when he was on Haldol, at that point in time, in your opinion, was he sane or insane?

A. At that point in time, in my opinion, he was able to distinguish right from wrong.

Q. Also, on that date in question when he was on Haldol did he have the capacity to know of the fact of his impending execution?

A. Yes, sir, I went into that with him that day specifically as I do most of the time when I see him. He was aware of where he was, he was aware that he was under a sentence of death. He was aware that he could be killed by the electrocution, and he was aware of why he was there.



Q. That was my next question. Did he understand the reason for the death penalty...

A. Yes, sir.

Q. ...being imposed?

A. He did, though at the time he denied his guilt to me for the crime. And he knew why he was there.

(R., p. 0568; emphasis supplied).

A common thread throughout all of Dr. Cox's testimony is the relationship between the inmate's competency and whether or not he's medicated. By ordering his client removed from medication, Mr. Nordyke has attempted to stifle the sanity hearing process. Dr. Cox stated in his April 20, 1988 report the likely result of such a strategy:

> "It is my opinion that if Mr. Perry is allowed to remain off neuroleptic medication for any significant period of time (by this I mean three weeks or longer), I believe he will become so psychotic that he will not be competent to be executed." (Doctor's report of April 20, 1988; emphasis supplied)

On the other hand, while the petitioner is maintained on a routine medication schedule, Dr. Cox concluded:

> "He (the defendant) has been in fairly good contact with reality, and certainly did appreciate the seriousness of his situation and the purpose of his death sentence." (Ibid.; Emphasis supplied).

Evidence gathered from Dr. Cox' testimony clearly establishes that the petitioner is PRESENTLY competent to be executed, and if he becomes incompetent at some point in the future, it is because the petitioner's attorney has been allowed to meddle with the petitioner's medication.

(iii.) Dr. Vincent's testimony:

Dr. Vincent's testimony supports a finding that the petitioner meets the criteria of Ford.

In questioning by the trial court, Dr. Vincent testified:

[By The Court:]

Q. The issue today, Dr. Vincent, of course, is this competency to be executed. And I know you're familiar with other competency rulings where you've testified in other courts. Based on the court cases that have been submitted to you the issue of competency to be executed, the inquiry is two-fold. Number one, whether or not he is aware or unaware of the punishment he is about to suffer. In March when you interviewed him did you have occasion to discuss with him the death sentence, the electric chair?

A. Yes, I did.

Q. What is -- or what was his understanding of that at that time?

A. That's one thing that I was trying to determine at that point. I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and he indicated at that point that he would be executed. So there was some understanding that if he's found competent to proceed that he would be executed.

Q. And he knows what that means? He knows what execution is? He knows what the death penalty is? He knows what the electric chair is?

A. Yes, he expressed some fear of dying in relationship to that.

Q. Now in your discussions did he appear to understand the reason that he was going to be executed?

A. That a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

(R., pp. 0622-23; emphasis supplied).

On the surface, Dr. Vincent's testimony to the trial court appears to somewhat contradict his earlier conclusion while under direct examination by the petitioner's attorney, Mr. Nordyke. While Dr. Vincent stated, in his opinion, the petitioner was not competent to be executed, his testimony that followed indicated that the petitioner knew he would be executed if the court determined he was competent during the hearings. The State respectfully submits that Dr. Vincent simply drew the wrong conclusion from the facts he observed. The facts Dr. Vincent reported clearly support the conclusion that Perry knows of his impending death and reason for it.

[By Mr. Nordyke:]



Q. And what was that opinion?

A. My opinion as of March 5th of this year was that he was not competent to be executed at that point.

Q. Would you please detail for the court what your evaluation consisted of and your findings that support that opinion?

A. The evaluation consisted of approximately ninety minutes of interview. I interviewed Mr. Perry alone in a small room for approximately ninety minutes. After he left I spent a few minutes talking with a particular security guard there who indicated that he had known Mr. Perry since he arrived in Angola. My observation of Mr. Perry at that time when I first said hello to him he thought I was -- he asked if I was you. And then he asked if I was some other attorney who had represented him previously. And I identified myself as a clinical psychologist who was evaluating him to determine his ability to proceed with the legal proceedings. I -- at some point after that we talked about his knowledge as far as whether he understood what would happen if he were indeed found to be competent to proceed. He did indicate that he knew that he would be executed if he were found competent to proceed. I, uh, he was a little dishevelled at the time that I saw him. His beard was very stragly (sic), very short haircut. He also had some black smudges on his face and I asked about those. He indicated that was from burning some plastic from an audio cassette. And I didn't quite understand what that was all about but I left it at that. He was in leg chains and I think that's the traditional way that people are interviewed on death row. He was very tangential with me, that is, that as I asked him questions he would initially typically respond to that question very quickly, slight (sic) off the subject, and talked about something completely irrelevant.

(R., pp. 0589-91; emphasis supplied.)

(iv.) Dr. Estes' testimony:

The testimony of the fourth expert, Dr. Estes, as to the petitioner's competency for execution is inconclusive. The State respectfully submits that Dr. Estes has misinterpreted the inmate's condition in light of the legal standard to be applied.

On direct examination by petitioner's attorney, Mr. Nordyke, Dr. Estes stated:

[By Mr. Nordyke:]

Q. What is your opinion as regards to his ability to understand the nature of execution and his ability to understand the finality of execution?

A. Well, he failed to show normal abilities in recalling and organizing facts and understanding reasons in various areas which my opinion would be includes the legal areas of concern, his execution, his conviction, his legal rights, ability to cooperate with various authorities at different times. I would presume that those difficulties would arise in various areas. It's my opinion that he was not completely aware of the nature of the proceedings against him even though he was able to acknowledge that he was on death row when I saw him, and at that time he was able to say that they want me dead, but I did not conclude that he understood his sentence, his punishment for what he did wrong.

(R., pp. 0637-38; emphasis supplied)

On cross examination by Mr. Salomon on behalf of the State, Dr. Estes admitted his conclusion was not based upon any specific test results. Dr. Estes' testimony resulted from a one-time, one-hour meeting with the petitioner. (R., p. 649, April 20, 1988)

[By Mr. Salomon:]

Q. Okay, but I mean I don't want you to repeat -- I mean we'll spend all day going over the eight or nine pages you got here. I mean what's the methods you employed in order to interview Mr. Perry? I mean you sat in here and we had somebody use the House, Tree, Person Test. Did you use that or something similar to it?

A. No.

Q. Did you use the MMPT? Did you use the TAT or something else that psychiatrists use as opposed to psychologists?

A. I did not use any specific psychological tests.

Q. Why not?

A. I wasn't sure that they would be the best way to elicit the information that I needed to have.

Q. Okay. So and your traditional you call just an interview? That's what you applied in this situation?

A. Yes.
(R., p. 0650).

(v.) Dr Kovac's testimony:

Dr. Kovac also testified before the trial court on September 30, 1988, she talked with the petitioner on the death row cell block. His conversation with Dr. Kovac was honest, open and frank. It reveals a man who is competent for execution.



Dr. Kovac testified as to a short conversation she had with the petitioner.

[By The Court:]

Q. What -- when you went and spoke with him that ten or fifteen minutes on the 26th, this past Monday, what did you talk about and what did he say?

A. Well, I initially just went back and introduced myself again to him since it had been a long time since I had seen him, and we talked just in general. I asked him how he was feeling and I told him I was -- my main reason for coming over was my concern that he was not taking his oral medication. I asked him, you know, how he had been doing in general and he said okay, sleeping a lot. Uh, he did say that occasionally he heard some voices. And I said, well, perhaps if you started taking your medication again that that would help and he said no. And then he went on to say that his attorney had instructed him not to take the medicine. And I said, well, you know, I understand but I think just for your best health we really need to talk about this because I think it's in your best health to take your medicine. And, uh, Mr. Perry said, no, my attorney has told me not to take my medicine. He said, it's just -- it's very simple to understand, take my pills and die, don't take my pills and live. And he said, so, I'm not going to take my pills. So I just -- I said, well, you know, you've got an injection that's going to be coming up, and he said, no, I'm not going to take my injections any more either. And I asked him about that and he said that they made his hip burn. And I told him, well, perhaps we could, you know, talk with one of the psychiatrists and maybe that was not the -- we could give him a different medication. And he said, no, my attorney said this is going to go to the supreme court. And he said, I'm just not going to take any -- I don't want any injections, I don't want any other medications. And...

(R., pp. 0717-18; emphasis supplied).

Dr. Kovac also reported that the petitioner's mental state at the time appeared appropriate.

[By The Court:]

Q. Just tell me what you observed...

A. Okay.

Q. ...and what Mr. Perry said and his demeanor as you saw it.

A. In response to the questions that were asked of Mr. Perry, again his affect seemed to be appropriate. He appeared to be coherent. His

> association -- he did not appear to me to be delusional, although he did state that he occasionally still was hearing voices. He stated that he was sleeping a lot, that he, you know, was eating his meals. (R., p. 0721).

In conclusion, the trial court, in this matter, weighed and balanced hundreds of pages of transcripts and other evidence to reach its conclusion that the petitioner was competent to be executed. Three of the four experts on the sanity commission found criteria that supports the petitioner is competent under the Ford standard. The trial court's decision must stand, absent an abuse of discretion. The State is convinced the record clearly shows that the petitioner is aware of his impending death and the reason for it.

There is no jurisprudence in this state concerning the amount of deference owed to a trial court's ruling that a death row inmate is competent for execution. However, this Honorable Court, in Perry, supra, indicated that the decision was one to be made by the trial judge, not the sanity commission. Also, in a pre-trial setting to determine competency to stand trial, this Honorable Court stated in State v. Bennett, 345 So.2d 1129 (La. 1977):

> "At the inquiry into defendant's competency, these vital factual considerations were supplanted by the physicians' conclusion of law that defendant was able to assist counsel. ONLY THE COURT, NOT THE DOCTOR, IS QUALIFIED TO MAKE THIS DECISION." Bennett, 345 So.2d at 1138. (Emphasis supplied).

In another case two years later concerning competency to proceed to trial, this Court in State v. Lawrence, 368 So.2d 699 (La. 1979) made a similar statement:

> "Although a trial judge's determination of capacity to stand trial is entitled to great weight, the trial judge may not rely so greatly on the medical testimony that he abandons the ultimate decision on competency to the medical experts." (Citation omitted.) Lawrence, 368 So.2d at 701.

In the case at bar, the trial court made the decision in accordance with this jurisprudence. Therefore, on appeal, it must be affirmed.



V. INMATE'S COUNSEL HAS ARGUED TO THIS HONORABLE COURT THAT HIS CLIENT IS INCOMPETENT UNDER ANY STANDARD BECAUSE HE IS MENTALLY ILL. THIS ARGUMENT DEFIES THE JURISPRUDENCE OF THIS STATE WHICH HOLDS THAT MENTAL ILLNESS ALONE IS NOT SUFFICIENT IN AND OF ITSELF TO ESTABLISH MENTAL INCAPACITY TO BE EXECUTED. INMATE HAS ALSO FAILED TO CARRY HIS BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE.

Three of the experts (Drs. Jimenez, Cox and Vincent) reached the same conclusion as to the petitioner's diagnosis: Schizoaffective Disorder. Dr. Cox stated the mental illness was something like diabetes; it cannot be cured, but it can be controlled with medication. (R., p. 0553) Dr. Estes stated he came to "a tentative conclusion" that the petitioner was also suffering from Schizoaffective Disorder. (R., p. 0639). That diagnosis was made in 1983 prior to the petitioner's trial, and Drs. Jimenez and Vincent, both of whom have had contact with the petitioner during both pre-trial and post-conviction proceedings, testified that diagnosis remained unchanged in 1988. (For Dr. Vincent, see R. p. 0593, 0619, 0632-33; for Dr. Jimenez, see R. p. 0511).

Opposing counsel repeatedly used the term "floridly psychotic" in its brief to this Honorable Court. The State would like to point out how the experts view those terms. Dr. Cox stated that "psychosis" is "a symptom like fever is a symptom. And Schizoaffective Disorder is an illness, it makes people become psychotic on occasion." (R., p. 0563) Dr. Vincent defined "floridly" as "blatantly or overtly or obviously psychotic." (R., p. 0596) In other words, when the opposing counsel refer to their client as "floridly psychotic," it only means that the petitioner is suffering from an apparent symptom of his mental illness. "Floridly psychotic" is not an end, in and of itself; it is a symptom, like a fever is a symptom of the flu.

A. The inmate suffers from the same mental illness today as he did prior to his trial and conviction. Mental illness did not prevent the petitioner's trial, conviction and sentence to death; it will not prevent his execution.

Petitioner's counsel argues the petitioner is mentally ill, and therefore cannot be executed. His mental illness has

been consistently diagnosed as Schizoaffective Disorder. Petitioner's first signs of mental illness date back to at least 1981, two years before the murders. Similar symptoms of the illness have been observed both during pre-conviction and post-conviction proceedings. Mental illness was not a bar to the petitioner's trial, conviction and death sentence; it is not a bar to this execution.

In State v. Chinn, 87 So.2d 315 (La. 1955) the court stated that mental illness or mental retardation alone was insufficient to prevent a defendant from proceeding to trial. In Chinn, the defendant was a convicted murderer with the intelligence of an 8- or 9-year-old. The court said:

> "We are mindful of the fact that it is possible for a person to have such a feeble mentality as to be unable to distinguish between right and wrong, to understand the proceedings against him, or to assist in his defense. However, according to the universally accepted jurisprudence, mere weakness of mentality or sub-normal intelligence does not, of itself, constitute legal insanity." Chinn, 87 So.2d at 320. (Citations omitted.)

Expert witnesses in this case have testified that the petitioner is suffering from the same mental illness today as he did prior to his trial. This Honorable Court in Perry, supra, addressed this petitioner's mental capacity to proceed to trial in great detail and decided:

> "We have discussed extensively Perry's mental capacity to proceed despite his withdrawal of the plea of 'not guilty and not guilty by reason of insanity.' We have determined the defendant was capable of proceeding at trial." Perry, 502 So.2d at 564.

In Perry this Court affirmed the petitioner's conviction and death sentence. Despite his mental illness, the petitioner was found by a sanity commission to be competent to stand trial; he understood the nature of the proceedings and was capable of assisting in his defense. Now a sanity commission has found that the petitioner understands the death penalty and reason for it, and therefore, is competent to be executed. Mental illness alone did not bar his conviction for five counts of first-degree murder. Mental illness shall not be a bar to execution.

If the petitioner's argument that mental illness alone was sufficient to bar execution, then there would be no need for a standard of competency to be executed. The test would



simply be whether or not mental illness exists. This is contrary to the basic legal precepts embraced by this State, this nation and even the common law.

Opposing counsel in their brief focused heavily on the petitioner's diagnosis, symptoms, bizarre behavior and statements, and mental health treatment as the reason why the petitioner was not competent for execution. However, taking all this bizarre behavior as a given, the expert testimony clearly showed, supra, that the petitioner still knew of his impending death and the reason for it. Although lengthy, the following excerpt of a Fifth Circuit case will give this Honorable Court a point for comparison.

In Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983), reh. den. 714 F.2d 137, cert. den., 463 U.S. 1237, 104 S.Ct. 211, 77 L.Ed.2d 1453, the condemned murderer had raised the issue of his sanity post-conviction as a reason to stay his execution. Gray had been convicted and sentenced to death for the murder of a 3-year-old girl.

The United States Court of Appeals, Fifth Circuit, for the Southern District of Mississippi, denied the death row inmate habeas corpus relief on the grounds of present insanity. This case was written prior to the Ford decision in 1986, and the standard applied by the 5th Circuit was more expansive than the one adopted in Ford.

The Mississippi Supreme Court denied Gray a writ of coram nobis. The Fifth Circuit concluded:

> "The claim for relief on present insanity was supported by strong affidavits...to the effect that he was a chronically psychotic young man: however, the mental condition or 'insanity' shown was also shown to have been of a nature long pre-existing Gray's trial and conviction. Under this record showing, therefore, the petitioner was not denied any substantive or procedural due process accorded him by Mississippi law." Gray, 710 F.2d at 1053.

In Gray, attorneys for both sides agreed to apply a standard enunciated by Justice Frankfurter in his dissent in Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed 604 (1950) and reprinted at 21 Am.Jur.2d "Criminal Law" at 123. It reads as follows:

> "The proper test of capacity at the time of punishment is whether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, what

he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court." 21 Am.Jur.2d "Criminal Law" at 257-58.

Against this standard, the Fifth Circuit thereby cited in detail the findings on Gray's mental capacity based on expert evaluation. A Dr. Lewis examined Gray for six hours and summarized her findings as follows:

"In conclusion, Jimmy Lee Gray is a chronically psychotic young man whose psychosis is manifested by delusions, auditory hallucinations, and bizarre beliefs. He is also extremely intelligent and attempts to hide this symptomatology. In addition, there is evidence of some central nervous system damage manifested by lapses of attention, dizziness and nausea periodically, inability to concentrate at certain times, multiple recurrent episodes of deja vu, and episodes of unprovoked intense fear and anxiety as well as episodes of extreme visual and perceptual clarity. He is also frequently loose, rambling, and illogical in his thought processes. His psychotic state coupled with his organic impairment undoubtedly contributed to his initial crime and to the second episode, for which he is currently incarcerated. Of note, his symptomatology, if properly worked up medically and psychologically, is amenable to treatment and he should be able to live and function safely in a prison environment." Gray, 710 F.2d at 1055.

The doctor continued:

"Mr. Gray is extremely paranoid. It is also clear that his profound mental and emotional disturbances frighten him, that his understanding of and even conscious awareness of his pathology is very limited, and that he would very much like to be considered sane and a sinner rather than to be thought to have such experiences. For these reasons, it is extremely difficult to elicit a history of symptomatology from him, and brief examinations such as Mr. Gray has had in the past, are ill-suited to uncovering the actual nature of his illness. In fact, I believe that even the symptomatology described in my report, based on a much longer examination, is most likely an underestimate of his psychiatric illness.

"In addition, because of the nature of his illness and his own incomprehension and fear of it, he is not competent to assist counsel or mental health experts in demonstrating a defense of his rights in light of his illness, for his ability to identify the relevant facts to confirm his defense is so gravely impaired. Nor is he able, to this day to understand or even to perceive or meaningfully describe the nature of the psychotic feelings which underlay the crimes for which he has been convicted, and for one



of which he now faces execution. In effect, he does not understand the crime for which he was tried.

"Mr. Gray's psychotic state, coupled with this organic impairment, undoubtedly contributed to his initial crime and to the second episode for which he is now awaiting execution. The facts concerning his mental state, indeed, demonstrate beyond question that the crime for which he faces execution (as well as the earlier offense) was committed while he was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Ibid.

Although Gray predates Ford by three years, the Fifth Circuit assumed that the Constitution would protect an incompetent from execution. The court stated its position as follows:

"We expressly do not hold (or deny) that the federal constitution's fifth and eighth amendments may implicate protection of the execution of the mentally incompetent or, at the least, may mandate procedural right by way of an evidentiary hearing to resolve this issue.

"Nevertheless, assuming for the present purposes the existence of such right, and further assuming that the test advanced by the parties is the proper one, we are ultimately unable to hold, in the present state of the law, that the showing made by Gray, if proved at a contested evidentiary hearing, would bring him within the scope of the putative constitutional protection against execution. The showing undoubtedly indicates that Gray has serious psychotic impairments that sometimes distort his appreciation of reality, and the mental illness shown might impair his ability to secure adequate diagnosis of his mental deficiencies. Nevertheless, as we view it, these mental deficiencies -- if fully proved -- would nevertheless not be of a nature to deprive him of 'sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment' or to deprive him of 'sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful.'" Solesbee v. Balkcom, supra, 339 U.S. at 20 n.3, 70 S.Ct. at 462 n.3.

"Gray thus has not made a showing sufficient to justify an evidentiary hearing on the issue of whether the federal constitution bars his execution on the ground of his present mental condition." Gray, 710 F.2d at 1056.

While lengthy, this excerpt proves that the petitioner Michael Owen Perry is competent under Ford to be executed. While the mental capacity of Gray and this petitioner have some points in common, the mental condition of Gray was far more

extreme. And yet, under a standard more stringent than Ford, Gray was held to be competent for execution.

Like Gray, Michael Owen Perry has a history of mental illness predating the crime by at least two years. Like Gray, Perry is intelligent, and has delusions, hallucinations and bizarre beliefs. The psychiatrist examining Gray reported "loose, rambling and illogical thought processes;" similar reports have been made about Perry. Like Gray, Perry as shown in medical reports and Dr. Kovac's testimony, supra, considers himself sane. However, the similarities end here. Gray was much worse for the simple fact he had organic brain damage. All experts agree the petitioner suffers from no organic mental impairment. (R. P. 0600). In other words, under a standard higher than Ford, a death row inmate with a mental condition far worse than the petitioner's was declared competent for execution. And even though Gray's mental state was far more severe than the petitioner's, the expert testified it could be controlled by medication. Perry's mental condition pales in comparison to Gray's. If Gray was competent for execution, Perry most certainly is.

B. The petitioner's counsel argues his client is "ambivalent" and hence is incompetent to be executed. Inmate's earlier ambivalence -- at times confessing to the murders, at times denying them -- did not prevent a 12-member jury of his peers from unanimously imposing a sentence of death. Hence, ambivalence is not a bar to execution.

Petitioner argues he is "ambivalent" and therefore, cannot be executed. Dr. Jimenez, supra, says petitioner meets Ford even though she finds "ambivalence."

Opposing counsel has twisted Dr. Jimenez' testimony as to her finding that the petitioner was "ambivalent." (See Pet.'s Brief, p. 51). While the doctor did state that she had found the petitioner "ambivalent," she did not explain in what context he was "ambivalent." Dr. Jimenez clearly said: "HE's aware that HE is on death row because HE's going to die. HE's aware that HE killed his family, and HE will tell you HE did." (See R. p. 0531, emphasis supplied.) Without a clear explanation of what the doctor meant by the term "ambivalence," it has no value to the question of the petitioner's present capacity to be executed. When asked how ambivalence might be eliminated or controlled, Dr. Jimenez suggested that medication should be increased.



[By Mr. Salomon:]

Q. How are we to stabilize him when there are no medications that eliminate ambivalence?

A. Well, that's the problem.

Q. You have medication that you would suggest issuing, offering and having him ingest to eliminate such ambivalence?

A. I don't really know that I would be able to eliminate it because it because -- but you could probably try him on a bigger medication and give it to him consistently and see then if there would be a change or there would be some improvement. He had improved before.

(R., p. 0532; emphasis supplied).

In addition, ambivalence, which means the simultaneous existence of conflicting emotions, is irrelevant. Admission of guilt is unnecessary. Many a condemned murderer has gone to his death claiming his innocence. Petitioner was ambivalent prior to his conviction -- at times he confessed to the murders, at times he denied them -- and yet it did not bar his conviction.

Prior to trial, the petitioner was also ambivalent when examined by Dr. Vincent as to the murders. Ambivalence is not a factor in the standard for determining competency for execution; therefore it does not stay execution.

C. The counsel for the inmate has misinterpreted the doctors' analogy to a "moving target." Experts testify that the inmate does respond to medication.

Petitioner argues he is a "moving target" even while medicated, and therefore cannot be executed. (See Pet.'s Brief, p. 50, 83). The petitioner's counsel has taken Dr. Cox's statements in reference to "moving target" and stretched them to mean the petitioner's mental capacity can never be stabilized. This is entirely incorrect. In fact, Dr. Cox concludes the opposite. The expert clearly says repeatedly that the petitioner responds to medication, and that if he is found to be deteriorating even while on medication, the solution is to either ensure that the inmate takes his medication or increase the dosage of the IM medication.

The term, "moving target" first appeared at the April 20, 1988 hearing in this context:

[By Mr. Nordyke:]

Q. Doctor, out in the hall you indicated that Michael was, quote, at best a "moving target." Would you explain to the Court what you meant by that?

A. I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

Q. So I guess in summary what I've heard you saying is that you've seen him not competent...

A. Yes, sir.

Q. ...Sometimes and you've seen him competent...

A. Yes, sir.

(R., pp. 0553-4; emphasis supplied)

Dr. Cox clearly stated at the April 20, 1988 hearing that the petitioner responds to medication. He said his diagnosis, in part, was based on this result: "Because he gets better when he takes medication and he gets worse when he doesn't." (R., p. 0557).

The second time Dr. Cox was questioned about the term "moving target" was at the September 30, 1988 hearing.

[By Mr. Giarrusso:]

Q. And the prior testimony that you gave at the April, 1988 hearing concerning Mr. Perry being a, quote, moving target, close quote...

A. Yes, sir.

Q. ...is still viable in your opinion today?

A. Yes, I do, I believe that.

(R., p. 0740; emphasis supplied)

Dr. Cox's use of the term "moving target" only describes how the petitioner reacts when he is taken on and off medication, as was done at the behest of his attorney. The petitioner needs a monthly intramuscular injection of Haldol-D



plus a daily supplemental oral dosage in order to be stabilized. Dr. Cox testified that on this regime, stabilization will not result until three months later. (R., p. 0743). In other words, if the petitioner is indeed a "moving target," Mr. Nordyke is responsible. Now Mr. Nordyke wants to benefit by this maneuver. On cross-examination, Mr. Salomon questioned Dr. Cox on the importance of routine medication:

[By Mr. Salomon:]

Q. And speaking of the oral medication, Dr. Cox, I understand from his medical information available at the hospital that he was to have a standing order of sorts for IM medication with Haldol?

A. The long-acting Haldol he was to receive two cc's every month on around the 10th of the month, the 10th or 11th, or something, every month, once a month. That medicine is given once a month.

Q. And do you know what precipitated that standing order or upon whose order that was?

A. I think it was ordered by Dr. Abase who is not a consulting -- Abade, rather, a consulting psychiatrist at Angola, who evaluated Mr. Perry and ordered this medication.

Q. Now this two milligrams or two cc's...

A. Two cc's, yes, sir.

Q. Two cc's of Haldol which is what we call the long-lasting medication, what is long lasting? What's the period?

A. This medicine can be given every month and given that way it will produce a circulating blood level, a therapeutic blood level that will last a month if the proper dosage is given. This drug people can take it monthly and get effective treatment from it if the dosage is proper.

Q. Okay. And you mentioned blood level, and I'd like to follow up by asking once you get a long-lasting injection of Haldol-D how long does it take for you to reach a plateau of sorts where you may, to use my terminology in layman words, stabilized?

A. Three months with that drug.

Q. And why is it, Dr. Cox, that we have in Mr. Perry's case oral medications which are assigned to supplement, apparently, this intramuscular injection he receives?

A. I don't believe he's been on an intramuscular (sic) for three months. And even if he has it's obvious he's not on enough medication, so he needs the supplement to control his symptoms.

Q. Okay. Why do you give a supplement on a daily through orals as well as the monthly injection?

A. Well, that's standard procedure with this medication that when you begin a person on Haldol long-acting for the first three months it's accepted procedure to use a supplement of oral medication until the patient does reach a plateau after three months at which point they can be maintained on the long-acting only. It's in the prescribing information with the medicine.

Q. That would be the Physician's Desk Reference?

A. Um-hum.

Q. Now what would happen if, assuming that you take your IM injections for the three month period that you don't supplement it with the orals on a daily basis?

A. The person would say (sic) ill longer, be harder to control their symptoms, they would remain psychotic longer.

Q. Now is there a way to stabilize a patient through injections only where you have a patient that's unable to ingest medication through the oral means?

A. It's difficult. It would mean probably having to give the patient the medication not only in long-acting injectable form but short-acting injectable form, also.

Q. That would be short-acting when they manifest the symptoms?

A. Yes, or daily, you know, we have written protocols to treat people with IM medication if they refuse it by mouth, two or three injections a day.

(R., pp. 0742-4; emphasis supplied).

Mr. Nordyke also questioned Dr. Vincent about the term "moving target."

[By Mr. Nordyke:]

Q. And that was -- were you in the courtroom when Dr. Cox testified?

A. Yes, I was.

Q. Would you agree with his analysis -- I think he said it was an offhand remark, a moving target?

A. Mr. Perry is a very a very interesting individual, this case is a very interesting case. It's also very difficult. Given his history, given his intelligence, given his tendency to be somewhat slippery in that we're not always sure exactly what's going on with him, yes, a moving target would be an apt description.

Q. I guess what I'm finding interesting is you saw him, I think, two days after Dr. Cox did and he was floridly psychotic when you saw him and still on medication at that occasion at that point in



time. Is that consistent with the illness of Schizoaffective Disorder?

A. I'm assuming he was taking medication at that point.

Q. Okay.

A. The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. But if indeed he was taking it it's quite possible to be floridly psychotic at one point and yet more rational at other points. And that's not very unusual.

(R., pp. 0593-4; emphasis supplied).

Judging from Dr. Vincent's testimony, it appears he interpreted the term "moving target" as more or less a description of the petitioner, rather than a reflection of whether the petitioner was medicated or not. Dr. Vincent said he found working with the petitioner was challenging because he was intelligent and "somewhat slippery."

In conclusion, whether or not this Honorable Court agrees that the petitioner is a "moving target," it should not preclude his execution. Medication enhances the petitioner's mental capacity, but even without medication, the petitioner is still competent for execution under the Ford test. Dr. Cox testified that even at petitioner's worst moments, he is capable of understanding he will be executed for murdering five members of his family.

[By The Court:]

Q. Have you ever seen him psychotic when he was on his medication?

A. Yes, sir, I've seen him have psychotic symptoms when he was on medication, yes, sir.

Q. When he's on medication and when he is in these psychotic -- in this psychotic condition was he able then to be competent...

A. If you're ...

Q. ...relative to the sentence in this case?

A. I've seen him at times when he was having I thought psychotic symptoms but he was aware of the fact that he had a sentence of death and that he could be executed and he could be killed by the execution process, yes, sir.

(R., pp. 0556-7; emphasis supplied).

The State also reminds this Honorable court that the petitioner's own chart shows that he was not medicated during his trial, and yet a sanity commission found that he was competent to stand trial and a jury rejected his mitigating evidence of insanity at the penalty phase, all affirmed on direct appellate review. (See Pet.'s Brief, p. 37).

D. Petitioner's counsel argues his client is incompetent to be executed because HE doesn't know HE is sentenced to die. Petitioner's own actions and expert testimony, however, prove the petitioner is very much aware of his impending fate.

This assertion that the petitioner does not know HE is scheduled to die for the murders of his family is simply not supported by the testimony. Dr. Cox stated the petitioner knew He was to be electrocuted (R., pp. 0556-7).

Dr. Kovac's testimony implies the petitioner is very much aware of HIS fate. She testified: "He said, 'it's just -- it's very simple to understand, take my pills and die, don't take my pills and live.' And he said, 'so I'm not going to take my pills.'" (R., p. 0717; emphasis supplied).

Dr. Vincent stated: "HE did indicate that HE knew that HE would be executed if HE were found competent to proceed." (R., p. 0590; emphasis supplied).

On questioning by the trial court, Dr. Vincent, despite a conclusion that the petitioner was not competent to proceed to execution, contradicted that finding when viewed in light of Ford by testifying:

> "I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and HE indicated at that point that HE would be executed. So there was some understanding that if HE's found competent to proceed that HE would be executed." (R., p. 0623; emphasis supplied).

The doctor also testified that the petitioner is afraid to die. (R., p. 0623; emphasis supplied). Dr. Vincent's only concern on this issue was that while the petitioner understood that a person convicted of first-degree murder can be sentenced to death, the doctor felt the petitioner fluctuated on whether or not he committed the murders.



Dr. Jimenez also testified that the petitioner knew he faced the electric chair because of his conduct. (R., p. 0530-1; R. p. 0753).

Although Dr. Estes' testimony is fuzzy on this issue, he did testify:

> "It's my opinion that he was not completely aware of the nature of the proceedings against him even though HE was able to acknowledge that HE was on death row when I saw him, and at the time HE was able to say that they want me dead, but I did not conclude that he understood his sentence, his punishment for what he did wrong." (R., pp. 0637-8; emphasis supplied).

The evidence overwhelmingly proves that the petitioner knows HE is to be executed. As Dr. Jimenez' testimony points out: "...He was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed, and why, why HE, who ONLY killed five people, should be executed." (R., p. 0758; emphasis supplied.) Does a man who is unsure of his own fate ask such a question? Obviously not.

E. The inmate's evidence is duplicitous, unreliable, biased, misleading or self-serving, and thus, is insufficient to prove by a preponderance that the petitioner has become insane subsequent to conviction.

The petitioner's attorneys have included numerous charts and tables in their brief to this Honorable Court. The State contends this material is neither scientific nor objective.

Because of time restraints the State was unable to verify all charts and tables. However, the State reviewed the Alabama statute cited as their first reference. (See Pet.'s Brief, p. 71). The statute called for a temporary transfer of a death row inmate to a state hospital only for the duration of a mental examination. The statute in question also allowed a death row inmate one chance without judicial review to question his sanity post-conviction, and thereby, supported the state's interest in finality.

Petitioner's charts and records also indicate he was hospitalized "through most of January 1986." However, the petitioner was hospitalized for only six days in January 1986.

Petitioner's chart also misleads this Honorable Court into believing that the petitioner was hospitalized for 45 percent of the year during 1986. (See Pet.'s Brief, p. 36). The medical records clearly show that the petitioner was hospitalized between December 20, 1985 and January 6, 1986, for a total of 17 days -- hardly 45 percent of the year of 1986.

Another inaccuracy is that the discharge summary on the petitioner for January 6, 1986 and the emergency room report for December 20, 1985 show that the only diagnosis of the petitioner was done by a nurse. The doctor who examined the petitioner did not record his diagnosis; the space on the medical record for this information has been left blank. However, the opposing counsel's brief (See Pet.'s Brief, p. 43) incorrectly states that the doctor made a diagnosis on the petitioner.

Finally, the petitioner's counsel has arbitrarily cut off all medical records at January, 1988, which at this point in the proceeding, is more than a year ago. The State finds this extremely odd since the issue before this Honorable Court is the petitioner's PRESENT mental capacity to proceed to execution.

As to the petitioner's other evidence, such as medical records from Central State Hospital and the Feliciana Forensic Facility, this has already been reviewed and decided upon in past sanity hearings. If these records did not prove the petitioner's insanity before, there is no reason why they would prove it now. This evidence is merely duplicitous. Using this same evidence, a sanity commission found that the petitioner was competent to stand trial. Hence, if the evidence is unchanged, so must be the result. The petitioner is competent to be executed.

Finally, the State contends that the petitioner's videotaped courtroom performance carries little weight because it was "show time." The petitioner was well aware that a video camera was focused exclusively on him. He also knows that if he acts crazy, he cannot be executed. This fact alone must cast doubt as to the validity of his courtroom behavior.

First of all, the petitioner has a history of malingering and malingering symptoms of the medicine's side-effects. Dr. Jimenez said petitioner is smart enough to act crazy.



[By Mr. Salomon:]

Q. And, Dr. Jimenez, am I paraphrasing you correctly, I believe, earlier when you said -- or testified in this same courtroom on this same witness stand that Mr. Perry is basically smart enough to act crazy?

A. Yes, sir.

(R., p. 0535; emphasis supplied).

As stated earlier, the petitioner has also equated his position with that of mass murderer Charles Manson, and as Mr. Salomon pointed out in his argument to the trial court, supra, many of the expressions used by the petitioner in his courtroom appearance are identical to those used by Manson. There is no doubt Mr. Perry is intelligent. He's smart enough to enhance his courtroom appearance with crazy statements. Dr. Vincent also recognized petitioner is intelligent and "somewhat slippery." (R., pp. 0593-94). The State would like to stress, that at this point, the petitioner has nothing to lose and everything to gain if he convinced a court he is crazy.

Dr. Jimenez also has testified that at times the petitioner exaggerated the symptoms of his illness.

[By Mr. Salomon:]

Q. Doctor, in regards to the Haldol with which Mr. Perry was medicated prior to his trial, and as I understand it, since he's been on death row, he has exhibited symptoms that were side effects?

A. Yes, sir.

Q. Okay. And some of those were what?

A. Some of those exist but at times he would exaggerate them.

Q. All right. The symptoms would include drooling?

A. Yes.

Q. Impaired gait or walking?

A. Yes.

(R., p. 0527; emphasis supplied).

While Dr. Jimenez reported that the petitioner had malingered in the past, Dr. Cox said he would not be surprised if a death row inmate would malinger, but that he had not personally seen the petitioner malinger.

[By Mr. Salomon:]

Q. Now can you offer to the court any analysis or opinion, being an expert in forensic psychiatry, on why Mr. Perry would have malingered while medicated with Haldol, as we discussed the one aspect of psychotic illness within Schizoaffective Disorder?

A. Well, I think it's obvious he could have malingered psychotic symptoms at some point to escape prosecution for the crime for which he was charged. That's a very distinct possibility. He might have malingered psychotic symptoms to get moved from one part of the hospital to another, that happens sometimes.

Q. And have you ever found any objective criteria or facts on which to base a similar opinion?

A. With respect to him?

Q. Yes.

A. Now I'm not sure I understand the question.

Q. Well, just as Dr. Jimenez found that he malingered while on medication, have you determined him to malinger while on medication?

A. No, sir, I don't think I have. I can't honestly say that I have ever seen him malinger while he's on medication.

Q. Have you ever utilized any specific tests in order to confront the question of malingering while medicated?

A. I don't know of any specific tests that exist. When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's a change in his function. To me, there's been a very clear relationship between him being compliant with medicine in the clinical picture that I see when I examine him.

Q. Have you ever detected him to be malingering whether on or off medication?

A. I can't say that I have, no.

Q. Do you recognize any symptoms of malingering?

A. No.

Q. Would not that guy who was in here a moment ago on a different case -- there are some objective criteria for malingering, correct?

A. Yes.

Q. And what are those?

A. Well, he could give an inconsistent history, he could give inconsistent symptoms, uh, his behavior would change. And this is one of the valuable things about having people in a place like forensic, its shall we say easy to malinger symptoms. You come in to see me for thirty to forty-five minutes and just sit there for that limited period of time and act crazy. It's much more difficult to do it around the clock twenty-four hours a day consistently over a period of days or weeks. So this is the sort of pattern you'd begin to notice in people, that they look crazy when they come in to see the doctor but the staff says the minute they leave the room they do find they always win the poker games in the ward, uh, etcetera, etcetera, are very aware of what's going on, understands the rules of the institution, all this sort of thing. But when they see you they suddenly select if they go crazy. They also claim say symptoms which really don't make sense, certain sorts of memory deficits. They claim certain sorts of symptoms that don't fit with the diagnosis they have. These are some of the things you notice.

(R., pp. 0564-6; emphasis supplied).

Whether the petitioner has malingered symptoms or not, the evidence clearly shows that Michael Owen Perry and his counsel have jointly decided to forego medical treatment in hopes of "trumping" a valid death sentence. This is obvious from Mr. Nordyke's referral to his client as an "exhibit." (R., p. 0661). Petitioner and his counsel have teamed up to induce insanity and create a loophole to execution.

While the petitioner performed his role as a "crazy man" while under his attorney's direct examination, a close look at the cross-examination by Mr. Salomon will prove that the petitioner had direct recall over events that have been important in his life. For instance, the petitioner remembered sitting in the courtroom for his trial, he knew there were 12 members of the jury, he remembered his birthday, his father's name, the trial judge's name, the reason for the trial, the fact the jury had condemned him to death in the electric chair, as well as other facts about his family members. Simply put, when asked a direct question, the petitioner could give a direct answer.

In the petitioner's brief, opposing counsel made several off-hand remarks that need to be addressed. First, petitioner's counsel stated that "the State of Louisiana chose to present NO evidence." (Pet.'s Brief, p. 10). This presupposes the State had a burden of proof. Obviously our opponents have forgotten THEY must prove the petitioner's insanity SUBSEQUENT to conviction by a preponderance of the evidence. The State has no such burden.

Second, opposing counsel appears to indicate that if there is any doubt as to the petitioner's capacity, his execution should be stayed. (Pet.'s Brief, p. 52). In other words, opposing counsel wants to point to one piece of evidence and say: 'See, this is doubt. Therefore, he's incompetent.' Again, this overlooks that the petitioner needs to prove his case by a preponderance. Any doubt won't do.

Attorneys for the petitioner allege they have carried their proof by a preponderance. As this brief clearly shows, obviously they have not. In fact, the State contends that the opposing counsel has not even come close. The petitioner's brief is full of contradictions. For example, at one point, opposing counsel will argue their client is incompetent under "any" standard, which logically must include Ford (See Pet.'s Brief, p. 53-54). Two pages later, the attorneys cite Dr. Cox (See Pet.'s Brief, p. 56), whose testimony clearly shows that even at his worst moments, the petitioner is aware of his death sentence and is aware he will die from electrocution.

Perry's attorneys also accused the trial court of abusing its discretion because its decision was based on "'pick and choose' testimony." (See Pet.'s Brief, p. 57). At the moment this line was written, opposing counsel must have forgotten that the trial court, according to the jurisprudence of this State, must decide the question. In other words, the trial court is mandated by law to consider all the evidence, and then, after determining which evidence is most trustworthy and most reliable, reach a decision. Any other method is an abuse of discretion.

And while opposing counsel accuses the trial court of "pick and choose," they apparently believe their philosophy is better. That is, they "pick and twist" expert testimony to support their arguments. For example, the testimony of Dr. Jimenez concerning the term "ambivalent" and the testimony of Dr. Cox concerning the term "moving target" were taken out of context, and molded as needed to support their claims.

As the State's brief pointed out, supra, Dr. Jimenez found the petitioner clearly met the Ford standard; her use of the term "ambivalent" was never defined in context as to what the petitioner was "ambivalent" about. Dr. Cox also testified that despite describing the petitioner as a "moving target," the petitioner could be stabilized with medication. Drs. Vincent and Cox agreed it is not unusual for this petitioner or



others to fool medical personnel by pretending to take the oral medication when, in fact, they are not. Dr. Jimenez said the only proof-positive means of administering such medication is by injection.

The record clearly shows that if the petitioner's mental state varied, it was all attributed to petitioner's counsel, Mr. Nordyke, who removed his client from medication even though doctors have advised that Haldol is medically necessary for the petitioner's well-being.

The petitioner's brief has other inaccuracies as well. For instance, opposing counsel stated the petitioner was "declared incompetent to stand trial." This is clearly wrong. As this Honorable Court recognized in Perry, supra, rather, the experts concluded that the petitioner needed "further evaluation." (Perry, at 502 So.2nd at 547-8.)

In short, the petitioner's brief is inaccurate, inflammatory and convoluted, and therefore, is deserving of little credence.

VI. INMATE'S COUNSEL ARGUES THAT LA. C.CR.P. ART. 641 IS THE STANDARD OF COMPETENCY TO BE EXECUTED IN LOUISIANA. THUS, UNLESS THE PETITIONER CAN UNDERSTAND THE PROCEEDINGS AGAINST HIM AND ASSIST IN HIS DEFENSE, HE IS INCOMPETENT TO BE EXECUTED. THIS ARGUMENT, HOWEVER, IS CONTRARY TO THIS STATE'S POSITIVE LAW AND JURISPRUDENCE.

At this point, the State would like to focus on why the standard of competency to be executed in Louisiana is NOT La. C.Cr.P. art. 641, a standard written expressly for competency to proceed to trial. Art. 641 provides:

> Mental capacity to proceed exists when, as a result of mental disease or defect, a DEFENDANT presently lacks the capacity of understand the proceedings against him or to assist in his defense." La. C.Cr.P. art. 641 (West 1989), (Emphasis supplied.)

A. The Louisiana State Legislature has never made a conscious choice to use art. 641 as the test of competency to be executed. This Honorable Court has also deferred to the State Legislature in drafting standards of competency.

Clearly the positive law of this State does not support the inmate's contention that art. 641, rather than Ford, is the STANDARD of competency to be executed. The State Legislature, when drafting art. 641 in 1966, never intended that the standard should be applied post-conviction in a proceeding to determine whether a death row inmate is competent for execution. A close and detailed analysis of art. 641, including the jurisprudence surrounding its application, supported further by historical research, is conclusive proof that Louisiana, in fact, has never adopted art. 641 as the STANDARD. Therefore, as the State has argued previously, the STANDARD of competency for execution in Louisiana is the STANDARD applied by the trial court to the case at bar: The inmate understands the death penalty and the reason for it.

First of all, a starting point for the State's argument is that art. 641 predates Ford v. Wainwright by 20 years. Prior to the Ford decision in 1986, a substantive right under the Eighth Amendment not to be executed while insane was never recognized. If this Honorable Court was to agree to the petitioner's contention that when art. 641 was written, it was intended to apply to the petitioner's situation, then the Court is, in effect saying, that by statute, the State Legislature granted a death row inmate a statutory right not to be executed



while insane 20 years before the Ford decision. The State contends that this Honorable Court will reject such an implication. If the petitioner's argument is accepted, every death row inmate who has been seated in the State's electric chair for the past 23 years had a similar statutory right.

As this Honorable Court may remember, Justice Powell stated that the standard he adopted was a baseline standard, and that the States were free to adopt by statute more expansive standards of competency. The Louisiana State Legislature has not yet acted upon this invitation. Therefore, the standard in this State is the one adopted by the trial court in this matter, which was first enunciated by Justice Powell in Ford.

Before examining Louisiana's posture post-Ford, the State would like to examine how two other southern states, Texas and Florida, have reacted to the Ford opinion.

The State contends that Louisiana's position here is comparable to the one faced by a Texas court. In ex Parte Jordan, 758 S.W.2d 250 (Tex.Cr.App. 1988), a Texas court, lacking positive law on the issue, deferred to the State Legislature to address the issue. Until that time, the Texas court had embraced the Ford standard.

In ex parte Jordan, a death row inmate, convicted of capital murder and sentenced to death, appealed on a writ of habeas corpus that he was incompetent to be executed. The issue arose after the death row inmate had been charged with the aggravated assault resulting from an altercation between the inmate and deputies at the Harris County Jail. A psychiatrist had ruled that the death row inmate was incompetent to stand trial on the assault charge. Although this assault charge was subsequently dismissed, the inmate's competency to be executed was now in question. Three independent psychological evaluations concluded that the death row inmate "was presently unable to comprehend the pendency, nature and purpose of his execution, but, with appropriate treatment, could attain competency within the foreseeable future." ex parte Jordan, 758 S.W.2d at 251.

The petitioner, Clarence Curtis Jordan, himself, testified. Following a hearing, the trial court ruled that under Ford, the petitioner was incompetent to be executed. The court ruled that the insane defendant was not entitled to have his execution set aside, but was granted only a stay of

execution until he regained competency; that the trial court procedures utilized to determine the defendant's competency was in compliance with the Eighth Amendment; and that the defendant was not entitled to be transferred to a mental hospital to undergo treatment, but was required to use the penitentiary's in-house facilities.

The Court of Criminal Appeals of Texas, en banc, granted the petitioner Mr. Jordan a stay of execution so it could review the validity of the post-conviction incompetency procedures in view of Ford. The Court stated that this case was the first in Texas to address the isque of execution competency as dictated under Ford. The trial court had referred to:

> "...the alarming lack of any Texas statute specifying the procedures to be followed in raising and determining a defendant's execution competency and in the treatment and periodic reassessment of competency following an incompetency finding. At a loss for any other alternative, the court sua sponte created its own procedures requiring a periodic psychiatric examination of applicant to be conducted every ninety (90) days." ex parte Jordan, 758 S.W.2d at 252.

The Appeals Court turned to the Ford decision and noted that while the United States Supreme Court "expressly charged the individual States with the task of developing procedures to ensure that the insane would not be executed," the Supreme Court gave little guidance on how it should be done. The Appeals Court stated:

> "Further, as pointed out by Justice Powell in his concurring opinion, the Court failed to articulate a proper legal test of insanity in the execution context. Justice Powell, the sole writer on the subject, concluded that the proper test should be whether the defendant was able to comprehend the nature, pendency and purpose of his execution. Thus, ultimately, and after much debate, two critical issues were left open: the constitutionally acceptable procedures necessary to effectuate Ford and the proper legal test of execution competency." ex parte Jordan, 758 S.W.2d at 252-253.

In reviewing Texas statutory law, the Appeals Court stated that of the 41 states that have a death penalty, at least 30 states had Ford statutes. However, Texas, like Louisiana, had no positive law concerning competency for execution. The Court continued:



> "At the present time, Texas has no statute addressing this issue. Ironically, this is a divergence from the past. At common law, Texas forbade execution of the insane and the 1879 through 1965 Codes of Criminal Procedure all contained statutes explicitly barring execution of the insane and setting out the general procedures to be followed once the issue was raised...However, in 1975, the legislature completely rewrote Art. 46.02 and inexplicably omitted the section dealing with execution competency...Legislative history sheds no light on the reason for this omission." ex parte Jordan, 758 S.W.2d at 253. (Citations omitted.)

Because Texas positive law was silent, the Appeals Court approved of the trial court following Ford both in regard to procedures as well as the legal test of insanity. Until the State Legislature said otherwise, the courts of Texas were directed to follow the standard enunciated in Ford. The following excerpts give some insight into the Appeals Court's position:

> "Presently, and especially in light of Ford, there is grave need for the reenactment of a more specific and directive version of the old statute. We find five procedural issues presented for IMMEDIATE LEGISLATIVE RESOLVE: (1) how possible incompetency is to be brought to the court's attention; (2) what fact-finding procedures are necessary to determine incompetency for execution; (3) what is the proper legal test of incompetency for execution; (4) upon a finding of incompetency, what treatment is to take place; and (5) how and upon what intervals is the possibility of regained competency to be brought to the court's attention. We leave the task of constructing an appropriate statute to the Legislature and invite them to do so at the earliest opportunity..." (Emphasis supplied.)
>
> * * *
>
> "Even in the absence of statutory guidelines, the procedures adopted by the trial court in the instant case comport with the constitutional considerations discussed in Ford....
>
> * * *
>
> "The judge, in his competency determination, utilized the Powell test: whether applicant was capable of comprehending the nature, pendency and purpose of his execution. Applicant does not challenge use of this single Justice standard..." (Citations omitted.)
>
> * * *
>
> "We applaud the trial court's scrupulous action in this matter in that great efforts were made to effectuate the intent of Ford even in the absence of statutory law. We will further applaud prompt legislative action in this area.

> "The relief prayed for is granted only to the extend that applicant's execution is stayed until the trial court finds him competent for execution. Such competency is to be evaluated in accordance with the procedures previously followed which we have found to be in compliance with Ford." 758 S.W.2d at 253-255.

The State contends that ex parte Jordan is very persuasive as to the matter this Honorable Court now addresses. Like Texas, Louisiana has no positive law expressly designed for application in determining competency prior to execution. Like Texas, Louisiana has followed the common law rule that the insane will not be executed. Like Texas, Louisiana at one time had positive law concerning a death row inmate who had become insane. As will be seen, infra, Act No. 261 (1918) provided procedures to determine the competency of a condemned inmate who had been committed to a hospital following post-conviction insanity. Under the act, the inmate's execution would proceed if it was determined that his competency had been regained.

The immediate solution in Texas was one of judicial restraint. Until the Texas State Legislature acts, the Texas courts will follow the standard enunciated by Justice Powell in Ford. The Texas Appeals Court pointed out that while Justice Powell's legal test of competency has not directly been approved by the Court's majority, the standard is by statute adopted in some states and has been favorably referred to by Justices Brennan and Marshall in Johnson v. Cabana, supra.

In conclusion, the State urges this Honorable Court to follow the approach used in Texas. Until the Louisiana State Legislature addresses the issue, the legal test of competency prior to execution in Louisiana should be the Ford standard.

The state most directly affected by the Ford decision was Florida, which has reacted with positive law in compliance with that decision. In Ford, the United States Supreme Court in June 1986 had found that Florida's criminal procedures had violated a death row inmate's constitutional rights. The Florida Supreme Court, in response, promulgated in November 1986, an emergency rule of criminal procedure regarding competency to be executed. See In re Emergency Amendment to Florida Rules of Criminal Procedure, 497 So.2d 643 (Fla. 1986). The new emergency rules embraced a standard similar to the Ford standard: the death row inmate is competent for execution if he "understands the nature and effect of the death penalty and why it is to be imposed" upon him. Ibid. The new



emergency rules also provided for judicial proceedings to review the Governor's determination that the inmate was competent for execution.

In December 1987, the Florida Supreme Court amended these rules in In re Amendment to Fla. Rules of Cr. Proc., 518 So.2d 256 (Fla. 1987). The standard was stated in Fla. C.Cr.P. 3.811(b) as follows:

> "A person under sentence of death is insane for the purposes of execution if such person lacks the mental capacity to understand the fact of the impending execution and the reason for it." In re Amendment, 518 So.2d at 257.

While the wording of the legal test changed somewhat, it is still basically the same test enunciated by Justice Powell in Ford.

Florida's post-Ford rules were tested in Martin v. Dugger, 686 F.Supp. 1523 (S.D.Fla. 1988). Responding to a condemned murderer's writ of habeas corpus, the District Court held that the state court's competency proceedings violated the inmate's due process rights, and the state court was ordered to conduct an independent hearing to determine the inmate's competency to be executed.

The state court's mistake in this case was procedural; the District Court had found that while the inmate had been granted an evidentiary hearing, his attorney had not been given adequate notice that the defense should be prepared to call witnesses at the hearing. Instead, the defense attorney had learned that the hearing was evidentiary about 15 or 20 minutes before the hearing was to begin. Martin, 686 F.Supp. at 1547. The District Court ruled that this inadequate notice had deprived the inmate of a fair and impartial hearing.

Martin was the first case in Florida to test the state's post-Ford procedures. In this opinion, Chief Justice King examined the Ford opinion at great length. The legal test of insanity followed was basically the same test enunciated by Justice Powell.

In Martin the trial court had ruled that death row inmate Nollie Lee Martin was competent to be executed because he understood the nature and effect of the death penalty and why it was to be imposed on him. Martin had been convicted of murder following the kidnap, rape and murder of a college student.

The Florida Supreme Court in Martin v. State, 515 So.2d 189 (Fla. 1987) had affirmed the trial court's finding of competency to be executed. The District Court referred to this finding:

> "The court (Florida Supreme Court) noted that the fact that Martin believes that a satanic conspiracy resulted in his conviction does not override his understanding of why he is being executed. (Martin v. State). The court noted that 'these proceedings were directed only to Martin's competency to be executed, a NARROWER INTERPRETATION THAN WHAT IS REQUIRED FOR COMPETENCY TO STAND TRIAL.' (Martin v. State)." Martin, 686 F.Supp. at 1550 (Emphasis supplied).

District Judge King reviewed Justice Powell's test in light of post-Ford jurisprudence that has adopted the same legal test of insanity, as well as examined the reasons supporting the death penalty, primarily deterrence and retribution.

> "If both purposes behind the death penalty are to be served, and therefore, the sentence is to be carried out in accordance with the eighth amendment, the defendant must at least appreciate the connection between his crime and punishment. This appreciation consists of both a subjective and objective part. The subjective part is nothing more than the defendant's perception of the connection between his crime and punishment. A defendant must understand the fact he committed his crime and the fact that he will die at a specific time and place. A defendant must also understand the basic and fundamental logical proposition that because he has committed an act that society and all civilized humanity finds heinous he is to be killed. The objective aspect of this realization test is relatively straightforward. This concept determines whether the defendant's subjective understanding is grounded in reality; that is, is rational." Martin, 686 F.Supp. at 1570. (Footnotes omitted.)

Justice King explained that the "appreciation" he would require was very similar to Justice Powell's requirement of "perceives the connection."

> "The perceive the connection phrasing is not the complete description of the Powell requirement. Powell believed that the eighth amendment forbids the execution of condemned prisoners who are unaware of the punishment they are about to suffer and why they are to suffer it. Justice Powell's use of the term "why" may imply that some sort of explanation is necessary in order to serve the purposes behind the eighth amendment. To serve the policies behind the death penalty, no explanation is necessary. The defendant should only understand that he committed a crime that society finds offensive and because of it,



> he is to be punished by death. For eighth amendment purposes, the defendant is not entitled to a detailed explanation of death. Moreover, the defendant is not even entitled to an explanation as to why society (and, obviously, not himself) perceives the offense he committed to be heinous enough to deserve death as punishment. The court believes that Justice Powell's term 'why' can be read to be consistent with these viewpoints, and, hence, the appreciation of the connection between the crime and punishment definition is very similar to Justice Powell's viewpoint." Martin, 686 F.Supp. at 1570-1571.

In a footnote to the above passage, Judge King said a death row inmate is not entitled to a detailed explanation:

> "An ordinary person, who never possessed the tenacity to kill another human, may contract a fatal disease. This person will never understand why he is to die. In addition, Nollie Lee Martin never provided his victim with such an explanation. If the innocent person cannot receive this explanation, why should an individual who made a conscious decision to end another human's life?" Martin, 686 F.Supp. at 1571, footnote 21.

Opposing counsel has cited to this Honorable Court the American Bar Association, Criminal Justice Standards: Criminal Justice Mental Health Standards - Competence and Capital Punishment, Standard 7-5.6(b) (August 1987) in support of their position that the petitioner must be able to assist counsel in his defense, or otherwise, he is incompetent to be executed. The State was unable to locate this material. However, Judge King in Martin referred to the ABA standard and said that the legal test he supported was similar to the one the ABA had adopted.

> "This meaning of insanity is also consistent with the recent pronouncements of the American Bar Association concerning this topic...The ABA noted that its proposed standards were selected 'to reflect the substantive concern that individuals should not be executed when they lack the capacity for rational understanding of the nature of the proceedings or the penalty that is about to be imposed.' (ABA Standard 7-5.6(b), Comment) To the extent that this rational understanding of the nature of the penalty requires a realistic appreciation, the ABA standard conforms with the appreciation definition." Martin, 686 F.Supp. at 1571.

While the court in Martin disagreed with the trial court's finding that the rational understanding requirement in Dusky v. United States, 363 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), a test for competency to stand trial, was irrelevant when applied in a post-conviction execution competency proceeding, Judge King found the Dusky test of only limited guidance.

"The court must specifically note that the Dusky standard is not fully consistent with the eighth amendment. The Supreme Court formulated the Dusky test to handle a situation where a defendant was not yet tried, much less convicted and sentenced. This defendant required a heightened mental awareness to assure that his constitutional rights were safeguarded. For example, a defendant awaiting trial must be able to assist his counsel in his defense, and must be able to determine whether any of his constitutional rights should be waived. THESE CONCERNS ARE COMPLETELY ABSENT FOR THE PROPERLY CONDEMNED PRISONER. The mental state required here only guarantees that the state utilize the death penalty pursuant to the policies promoting capital punishment. The mental state requirement here is not developed to perserve (sic) other constitutional rights." Martin, 686 F.Supp. at 1572. Footnote 22. (Emphasis supplied.)

In conclusion, Judge King stated:

"A defendant may be mentally ill and still be competent enough to be executed. A condemned prisoner need not have all mental faculties; the prisoner need only appreciate the connection between the crime and punishment...Accordingly, this definition of insanity will govern at the evidentiary hearing. Martin must show that he lacks an appreciation of the connection between his crime and punishment, as discussed above." Martin, 686 F.Sup. at 1572-1573.

While the State has cited the Martin case at length, this Florida opinion strongly supports the State's conclusion that a pre-trial statute like art. 641 is not the proper test of incompetency where incompetency arises post-conviction and the question is the death row inmate's mental capacity for execution. Perry has been tried, convicted and sentenced to death.

The question here is how to define insanity in this context, i.e., prior to execution. Louisiana's criminal law has already defined insanity according to two other contexts in which it arises. La. R.S. 14:14 defines insanity at the time of the criminal act, and codifies the McNaughten rule that the offender is exempt from criminal responsibility if, because of a mental disease or mental defect, he was "incapable of distinguishing between right and wrong with reference to the conduct in question." This question is decided by the jury.

The second context of insanity is art. 641, i.e., the mental capacity necessary to proceed to trial on the merits. This question is decided by the judge.



In State v. Williams, 346 So.2d 181 (La. 1977), this Court recognized the definition of insanity depends on the context. "The law defines mental incompetence differently for different purposes. Compare, La. C.C. art. 31 (capacity to contract), La. C.Cr.P. art. 641 and La. R.S. 14:14." Williams, 346 So.2d at 186.

In State v. Bennett, 345 So.2d 1129 (La. 1977), this Court recognized the test of insanity is dependent upon the context in which it arose.

> "Due process, however, requires a level of EFFECTIVE participation by an accused in criminal proceedings against him. That defendant was found to know the difference between right and wrong would have been relevant in determining his criminal liability, but was totally irrelevant to the issue of his competency to stand trial." Bennett, 345 So.12d at 1137. (Citations omitted, emphasis by Court.)

The State contends, as did the trial court in this matter, that insanity at the time of execution is a third context, one the Code has not addressed and one which needs to be addressed by the State Legislature. (R., p.p. 0769-71). In Ford, Justice Powell expressly said, supra, that one reason for his concurring opinion was to define insanity IN THE CONTEXT of competency to be executed.

The State's position has long ago been recognized. Commentator Grover, 23 So. Calif. L.R. 246 (1950), wrote 39 years ago that the definition of insanity depends upon the context in which it arises:

> "First, it is essential to keep in mind the difference between insanity at the time of the alleged crime, insanity during the trial, and insanity after judgment. Sanity at the time of the crime is an element of guilt itself - at common law the issue was raised by a plea of 'not guilty,' and even under the statutory modifications enacted in some jurisdictions the accused is undoubtedly entitled to a jury trial on that question. Sanity during the trial is essential to an effective defense, and our concepts of fair trial and due process require a postponement if the defendant is found mentally deficient. Phyle, [Phyle v. Duffy, 338 U.S. 895, 70 S.Ct. 236, 94 L.Ed. 148 (1949)], however, was sane at both these times - his present mental condition, whatever it may be, does not affect his guilt nor does it affect the propriety of the trial in which that guilt was determined. In short, insanity commencing after judgment and operating only to delay execution is all that concerns us here." 23 So.Calif. L.R. at 247.

A close examination of art. 641 et seq. reveals that Chapter 1 through 4 of Title XXI "Insanity Proceedings" clearly shows that these articles were never written with the intent to apply to a post-conviction proceeding to determine competency for execution. While the State recognizes that the preliminary statement and comments are not part of the positive law, they are persuasive as to legislative intent. All articles in the chapter (art. 641 et seq. except for art. 649.1) refer to the "defendant" defined in art. 934 as "a person who has been charged with or accused of an offense." Art. 648A refers to a "criminal prosecution" and "charged with a felony," and art. 648B refers to "if convicted."

The State has not overlooked Allen and Perry, supra, that have suggested that PROCEDURAL pre-trial articles should be applied by analogy to a post-trial proceeding for competency to be executed. This Honorable Court in Perry cited art. 642 as the procedural authority to allow the issue of standard of competency to be raised at any time by the defense, the district attorney, or the court. The Allen procedural threshold of 'reasonable ground to believe" insanity has arisen subsequent to conviction has been traced to the predecessor of the present art. 643, a procedural type provision. The State contends the argument here is not over PROCEDURE. The argument is over the STANDARD of insanity. Prior instances of looking to pre-trial procedure do not address the issue of do we find our standard in pre-trial laws.

The procedures codified in the current pre-trial articles are the same procedures long ago recognized at common law. Thereby, the reliance on these pre-trial articles as procedural guides is nothing more than the common law would have required. In State v. Burnham, 111 So. 79 (La. 1926), the Louisiana Supreme Court stated that proceedings for present insanity claims should be made in compliance with the common law procedures.

> "The plea is made informally, the issue is raised, and the evidence is introduced. The judge, in his sound discretion, may appoint a lunacy commission, or he may cause to be produced before him all available witnesses in the case, expert as well as nonexpert, in order that proper inquiry may be made into all of the facts and circumstances touching the alleged present insanity of the accused. There is no limitation placed by the Reed case upon the method of investigation which the trial judge may adopt. In the absence of special statute on the subject, common law procedure must prevail in this state." Burnham, 111 So. at 82.



In State v. Reed, 41 La. Ann. 581, 7 So. 132 (La. 1889), the Supreme Court recognized the common law principle that:

> "...It is elementary that a man cannot plead, or be tried, or convicted, or sentenced, while in the state of insanity...Indeed, even after conviction, it may be opposed as a reason why sentence should not be passed...Whenever and however raised, evidence must be received, if offered, and the issue must, in some way, be disposed of. As to the mode of disposition, it seems that much is left to the discretion of the judge." Reed, 7 So. at 582-583.

The Burnham and Reed cases illustrate that this Honorable Court has discretion in deciding what procedures are applicable to an incompetency hearing. On the other hand, unlike a PROCEDURAL mechanism, this Court has deferred to the State Legislature in drafting STANDARDS of competency.

In State v. Andrews, 369 So.2d 1049 (La. 1979) this Court said:

> "This court is not unaware that the McNaughten test has long been under attack, but our legislature has by R.S. 14:14 expressly adopted the McNaughten test of insanity; whether wise or unwise, this legislative choice does not admit of judicial substitution of another test. Any modification or liberalization of our test of insanity in R.S. 14:14 must start with the legislature." Andrews, 369 So.2d at 1054. (Citations omitted; emphasis supplied).

The Bennett opinion, supra, also deferred to the State Legislature in addressing any problems a mentally retarded offender may face in the criminal justice system by stating that "the defendant's proposals for reform are more properly the subject of legislative than judicial action." Bennett, 345 So.2d at 1136.

Most recently, this Honorable Court in State v. Stone, 535 So.2d 362 (La. 1988) deferred to the legislature to address the issue of whether a 15-year-old defendant subject to the death penalty was a "conscious, deliberate decision" by the State Legislature. This Court was reacting to Thompson v. Oklahoma, _____U.S. _____, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which a plurality of the United States Supreme Court has held it would be unconstitutional to execute a defendant under the age of 16. Under the Louisiana statutory scheme, a 15-year-old defendant could be tried as an adult on a first-degree murder charge, and thereby, exposed to the death penalty. The United States Supreme Court had found that no

state had, by statute, directly provided that a 15-year-old could be executed. Oklahoma law, like Louisiana's, had made such a result theoretically possible, but had not provided expressly for that result.

In Stone, Justice Cole in his concurring opinion said:

> "I agree completely with its (Thompson) analysis, concurring only to urge the Legislature of Louisiana to make clear whether or not the law of this state is to forbid the execution of any person for a crime committed before age of sixteen...In light of the rule adopted by the rather weak plurality in Thompson, the State of Louisiana is called upon to decide expressly whether or not it wishes to permit the execution of a person under the age of sixteen years. Only when a state legislature has done so can the issue be put squarely to the United States Supreme court for resolution." Stone, 535 So.12d at 365 (Cole, J., concurring).

Historical research revealed that Louisiana in the late 19th century and early 20th centuries had procedures for handling condemned prisoners who had been committed to a mental hospital because of post-conviction insanity. Under the old law, the death row prisoner's insanity resulted only in a stay of execution; once sanity was regained and a certain procedure was followed, the inmate was again subject to execution. This procedure, therefore, was a means to implement the common law rule not to execute the insane. The State's research failed to uncover a legal test of insanity in the context of granting a stay of execution. However, as argued in Argument II D, supra, where Louisiana's positive law was silent, the old Code required the courts to follow the common law. The State has already pointed out that one standard recognized at common law is basically the same standard as recommended by Justice Powell in Ford.

At the time of Allen, supra, in 1943, the current law of this state was Act No. 261 of 1918. The Allen court cites this provision as statutory authority for not executing the insane. This act would be repealed and superseded in 1944 by Act No. 303.

As will be discussed infra, Allen used the former La. C.Cr.P. art. 267 as its authority to authorize a hearing on a condemned inmate's claim that he has become insane subsequent to conviction. The Allen court made no further mention of Act No. 261. That act provides a commitment procedure for a prisoner who became insane subsequent to conviction. It read in pertinent part:



> "That where a person has been committed to a State Hospital for the Insane, who became insane after his conviction for a crime punishable by imprisonment in the penitentiary or BY DEATH, he shall not be restored to liberty, but upon regaining his sanity, he shall be delivered by the Superintendent of said Hospital for the Insane into the custody of the sheriff of the parish wherein he was convicted in order that the judgment and sentence of court may be executed in due course of law..." Act No. 261 (1918) at 483.

This provision, thereby, implies that the insane shall not be executed, but rather, were granted a stay of execution. However, once the condemned inmate regained his sanity, he was once again subject to execution. Act 261 also provided the insane inmate with a lunacy commission that would decide if the inmate's sanity had been restored so that the death penalty could legally be imposed. The commission's decision was subject to judicial review.

> "When any person charged with a felony necessarily punishable in the State Penitentiary, or by death, has been adjudged insane, before, or AFTER trial, or CONVICTION, and shall be committed to a State Hospital for the Insane, such person shall not be discharged from said Hospital for the Insane, or delivered into custody of the proper sheriff UNTIL the Superintendent of the East Louisiana Hospital for the Insane of the State of Louisiana, the Superintendent of the Louisiana Hospital for the Insane, and in case of their disagreement, a physician appointed by the Judge of the District Court from whence said criminal insane person was committed, which said gentlemen are hereby constituted as a commission, shall be satisfied after a thorough examination, that such person has been completely restored to sanity and may be discharged without danger to others; and if said commission shall determine that such person has been completely restored to sanity, they shall certify to this fact in writing, which certificate shall be made in duplicate, one to be filed in the office of the Hospital for the Insane, and the other delivered to the proper sheriff, or other official charged with the duty of executing the process of the particular court having jurisdiction in the case. PROVIDING THAT THE FINDING OF SAID COMMISSION BE SUBJECTED TO REVIEW BY THE COURT HAVING JURISDICTION OF THE PERSON.' Act No. 261 (1918) at 483. (Emphasis supplied.)

Therefore, at the time of Allen, Louisiana law had provided a procedure for determining whether a condemned inmate, who had become insane subsequent to conviction and who had been committed to a State Hospital, had regained his mental capacity, and therefore, would be subjected to execution anew. In Allen the condemned prisoner had not been committed to a State Hospital, but was raising in his own behalf the issue of

incompetency to be executed, claiming insanity subsequent to conviction. The Allen court applied a procedural pre-trial article to entitle the inmate the right to a hearing on the issue provided he raised a "reasonable ground to believe" he had become insane subsequent to conviction. The inmate failed to cross this threshold, and therefore, the court held he was not entitled to a hearing.

The now repealed Act 261 does indicate that the Louisiana Legislature at one time addressed the issue of post-conviction insanity of a death row inmate, at least as far as reinstating a death sentence after sanity had been regained. Like Texas, Louisiana's current positive law has not directly addressed the issue.

One reason for a gap in the State's positive law may hinge on the controversy surrounding the death penalty itself. Art. 641 was drafted in 1966, at a time where the future of the death penalty was in question. Hence, the urgency to address the issue that is now before this Court was not felt. This point is demonstrated by statistics provided by the United States Department of Justice on capital punishment. From 1940 to 1949, Louisiana had 47 executions; from 1950 to 1959, 27 executions. Between the years 1960 and 1969, during the time period when Art. 641 was drafted, there was only one execution. During the next decade that followed, 1970 to 1979, there were no executions. Therefore, for 20 years the chances that the issue of post-conviction competency for execution would arise was virtually non-existent by the simple fact that only one execution in that time period had occurred. However, the 1980s have once again seen the death penalty become a viable means of punishment. In Louisiana, between 1980 and 1987, there have been 15 executions. As the penalty becomes more frequently imposed, the need of a standard of post-conviction competency for execution becomes even greater.

B. Louisiana's jurisprudence has only applied art. 641 in a post-conviction proceeding to determine whether a defendant was competent for trial, not whether he was competent for execution.

The petitioner's counsel has cited two cases, Allen and Perry, in support of its argument that art. 641 is the standard of competency for claims of post-conviction insanity. The State contends that after a close examination of both cases, this Honorable Court will agree with the State's



position that no jurisprudence in this State has EVER held that the standard of competency for post-conviction insanity is art. 641.

To begin with, the opposing counsel has misapplied the Allen holding. In essence, the Allen court used the former La. C.Cr.P. art. 267, a precursor of today's art. 641 et seq., to establish a procedural threshold showing by the condemned murderer. To be entitled to a competency hearing, the inmate must show a "reasonable ground to believe" he had become insane subsequent to conviction. While Act 261 (1918), supra, provided a procedural mechanism to determine whether a committed death row inmate had regained his sanity in order to be competent for execution, there was no procedural mechanism for a death row inmate to initiate a judicial determination that he was incompetent for execution. To bridge an apparent gap in the criminal code, the Allen court applied a pre-trial article to a post-conviction proceeding.

> "By its specific terms, this article of the Code, (former art. 267) as amended, relates to proceedings 'before or during the trial' and before conviction, and prescribes the rule to be followed by the trial judge 'to determine the defendant's mental condition.' It says nothing about the proceedings to be followed in a case where a person becomes insane after conviction and sentence. But, for the same reason that a person is entitled to a hearing before conviction on the question of his sanity, he is entitled to a heaing (sic) after conviction; AND THE SAME RULES OF PROCEDURE GOVERN." Allen, 15 So.2d at 871.

By its own words, the Allen court was applying pre-trial articles post-conviction to establish a PROCEDURE. The court never reached the question of whether the STANDARD OF COMPETENCY designed expressly for determining competency to proceed to trial could also be applied by analogy to a post-conviction, competency to proceed to execution proceeding. The matter was simply NOT before the court; therefore, the case cannot be cited for the petitioner's proposition that art. 641 is the standard of competency for execution. The condemned murderer in Allen had failed at the courthouse door. The Allen court HELD that the trial court had not abused its discretion by not appointing a lunacy commission to investigate the relator's claim of post-conviction insanity because the relator had not presented the court "with a reasonable ground to believe" he had become insane subsequent to conviction. Only IF the relator had passed the threshold showing would the court have had to face the next issue of what standard of competency applied.

In addition, as argued in Argument II D, supra, the allegation in the relator's petition to the Allen court was that because of insanity, he was incapable of "understanding the proceedings against him." As pointed out earlier, this language is very close to the test enunciated by Justice Powell in Ford.

The United States Supreme Court itself did not recognize that art. 641 is the standard of post-conviction competency for execution. Justice Marshall, in his plurality opinion to Ford, supra, stated that of the 50 states, 41 states had either a death penalty statute or statutes governing execution procedures. Of those 41 states, 26 states had statutes regulating the suspension of execution of incompetent death row inmates. Noticeably absent on the list is art. 641 for Louisiana's positive law. Instead, Justice Marshall cites the Allen case as embracing the common law rule in Louisiana that the insane will not be executed. Ford, 106 S.Ct. at 2606, footnote 2.

Like Allen, the same Ford-like language is found in Perry, supra. This Honorable Court, in dicta, anticipated the very proceeding that is before you today. In that case, this Court stated that the petitioner would have to prove that because of insanity subsequent to conviction, he "LACKS THE CAPACITY TO UNDERSTAND THE DEATH PENALTY." The Court also required the petitioner to prove by a preponderance of the evidence that he "LACKS THE PRESENT CAPACITY TO UNDERGO EXECUTION." Perry, 502 So.2d at 564. Just previous to these statements, this Court cited the Ford opinion for the proposition that no state imposes the death penalty on the insane. Even though the Court cited art. 642 as a procedural process by which an allegation of post-conviction insanity could be raised by the court or the prosecutor, noticeably absent is ANY REFERENCE to art. 641. This Court in Perry also only cited Allen for two propositions: that the State would not execute an insane death row inmate, and that the inmate must establish a reasonable ground to believe he has become insane subsequent to conviction before he is entitled to a hearing on the issue.

In conclusion, this detailed analysis of Allen and Perry conclusively proves that art. 641 was never applied by this State's jurisprudence to determine post-conviction competency for execution.



The opposing counsel has argued to this Honorable Court that State v. Henson, 351 So.2d 1169 (La. 1977) had applied art. 641 to a post-conviction proceeding, and therefore should apply it to the case at bar. The State has no argument that art. 641 cannot be applied post-conviction. This is obviously provided for in art. 642 which allows the defendant to raise the issue of his mental capacity to proceed "AT ANY TIME." The argument is over what is the standard being applied TO: an ACCUSED'S COMPETENCY TO STAND TRIAL, or A CONDEMNED'S COMPETENCY TO BE EXECUTED? Jurisprudence has supported the post-conviction application of the former; no jurisprudence has supported the latter.

Henson centered on a defendant who had been convicted of burglary. His counsel motioned the trial court for a new trial and arrest of judgment. While awaiting sentencing, the same defendant was pending trial on other criminal charges. Defendant's counsel filed a motion for the appointment of a sanity commission; in behalf of the motion, the defense attorney presented an affidavit from a psychiatrist who had concluded that the defendant "was not presently able to understand the proceedings against him or to assist counsel in his defense..." A district court then ordered the appointment of a sanity commission to determine "defendant's mental capacity to proceed WITH RESPECT TO OTHER CRIMINAL CHARGES PENDING AGAINST HIM." Henson, 351 So.2d at 1172. However, the trial court denied the motion claiming the petitioner had not shown a reasonable ground to believe that his insanity had arisen subsequent to conviction. The Louisiana Supreme Court reversed the trial court, finding that the petitioner had met the requisite threshold requirement, and thereby was entitled to the commission's appointment.

The Court's ruling thereby stayed all criminal proceedings against Henson, including a hearing on the motion for a new trial and arrest of judgment, the court's denial of these motions, and his sentencing on the burglary conviction. However, the issue at all times, whether art. 641 was being applied prior to or after conviction, was the defendant's COMPETENCY TO STAND TRIAL. This case is not applicable to support the petitioner's argument, because art. 641 was not applied post-conviction to determine a condemned man's competency for execution. In other words, Henson was a hindsight examination of what should have occurred prior to trial and sentencing.

The State concedes that Allen, by its reliance on an old pre-trial article, and Perry, by its reliance on art. 642, might be interpreted as applying a few selected pre-trial articles to the case at bar. However, a clear distinction must be made between pre-trial PROCEDURES versus a pre-trial SUBSTANTIVE STANDARD. As argued previously, neither Allen nor Perry EVER applied the substantive standard of art. 641.

Also, Justice Marshall in Ford referred expressly to statutes written for determining a defendant's capacity to proceed to trial, and said in a footnote that the states may find these articles "instructive." Ford, , 106 S.Ct. at 2605-2606, footnote 4. He never said those statutes were mandatory or binding. In fact, Justice Marshall, at the time he wrote Ford, and subsequent to Ford in Johnson v. Cabana, supra, has stated his support for the standard as enunciated by Justice Powell.

Most importantly, the United States Supreme Court in Ford did not view art. 641 as the standard in Louisiana to apply to a post-conviction competency hearing for proceeding to execution. As pointed out, supra, Justice Marshall omitted any reference to it in his footnote. Ford, 106 S.Ct. at 2601-2602, footnote 2. Even more persuasive is the omission by Justice Powell of art. 641. Justice Powell opined that requiring a condemned inmate to assist in his defense was an unnecessary element of a competency standard for execution. In a footnote, Justice Powell listed three states that require an inmate to assist in his defense: Mississippi, Utah and Missouri. Louisiana and art. 641 were noticeably absent. Ford, 106 S.Ct. at 2608, footnote 3.

C. The purpose behind art. 641 is to guarantee a defendant his constitutional right to a fair and impartial trial. Because a death row inmate claiming insanity as a bar to execution has already been given a fair and impartial trial, applying art. 641 as the standard post-conviction defeats the state's interest in finality.

Justice Powell's standard in Ford was expressly written to define insanity in the context in which it arises, that is, subsequent to conviction and as a stay to a validly imposed sentence of death. Hence, the standard, as defined by Justice Powell, serves the purposes of the death penalty. This is precisely the strongest argument on why art. 641 IS NOT AND



SHOULD NOT be the standard of competency for execution. The petitioner in this case at bar is perverting art. 641's purpose by attempting to have it applied post-conviction to win a stay of execution.

When a DEFENDANT is awaiting trial on criminal charges, he is an ACCUSED fully cloaked in the presumption of innocence. Art. 641 was specifically designed to protect that defendant's constitutional right to a fair and impartial trial. That entire purpose is dissolved once a valid sentence of death is imposed. The DEFENDANT is now the CONDEMNED. The question in the case at bar is not whether the petitioner had a fair and impartial trial. That question has been answered in the affirmative on appeal to this Honorable Court, with writs denied by the United States Supreme Court. The question here is whether this condemned man is competent for execution. The State emphatically believes that the standard of competency in art. 641 was NEVER intended to answer this question. Furthermore, no jurisprudence has ever applied the standard to this context.

Lastly, the petitioner's guilt and penalty phase is now final. His only affirmative defense to the imposition of a valid death sentence is his insanity. The standard of art. 641 was designed to ensure that a DEFENDANT had a fair shot at winning an adversarial contest against the state. The gamesmanship of an adversarial nature is lost once a conviction is rendered. As Justices Powell and O'Connor point out in their opinions in Ford, due process is flexible; once a defendant crosses the line from being an ACCUSED to becoming a CONDEMNED, his due process rights are diminished accordingly. The State's need of finality and the effective administration of criminal justice override granting a condemned inmate the same due process right post-conviction as he enjoyed pre-trial.

D. The trial court did not violate the petitioner's due process rights by applying the Ford standard instead of art. 641 as the standard of competency to be executed. Louisiana has not vested a state-right entitlement in a death row inmate by adopting art. 641 for a pre-trial proceeding.

As was argued previously in Argument III B, supra, the State did not violate the petitioner's due process rights under the Fourteenth Amendment by NOT applying the art. 641 standard. To be afforded relief under this argument, the

petitioner would have to show that art. 641, like the Florida statute in Ford, specifically vested in the petitioner a liberty interest not to be executed while insane. In light of the State's foregoing arguments, it is clear that art. 641 was never intended and has never been applied to answer the question of competency for execution. Art. 641 is clearly not "language of an unmistakable mandatory character" as required by Hewitt v. Helms, supra, to create a liberty interest protected by the Fourteenth Amendment. Where there is no specific statute vesting such a right or procedure, a state must fall back to the Ford standard.

Louisiana has done just that. In its jurisprudence, this State has adopted the Ford standard as the standard of competency for execution. Lowenfield, Perry and Allen implicitly recognize the Ford standard. Louisiana has also executed at least one prisoner, Leslie Lowenfield, in light of the Ford standard. Therefore, this petitioner's rights under Louisiana law are no greater than those enjoyed by Leslie Lowenfield. This petitioner's constitutional rights were fully protected when the trial court applied the Ford standard.



VII. THE FORD STANDARD IS DUAL PRONG: BY ADOPTING ART. 641, THIS NEW STANDARD WOULD SUBSUME THE FORD STANDARD PLUS ADD A THIRD PRONG OF REQURING A CAPACITY BY THE CONDEMNED INMATE TO ASSIST IN HIS DEFENSE. ASSUMING ARGUENDO THAT THIS HONORABLE COURT WOULD ADOPT ART. 641 AS THE STANDARD TO DETERMINE COMPETENCY FOR EXECUTION, THE STATE RESPECTFULLY SUBMITS THAT ANY ADDITIONAL SAFEGUARDS ARE OUTWEIGHED BY THE STATE'S INTEREST IN FINALITY.

The presumption for Argument VII, as well as the succeeding Argument VIII, is that, arguendo, art. 641 is the standard of competency for post-conviction insanity as a means to stay execution. For the sake of clarity, the State will discuss the following argument by dividing art. 641 according to its two elements. First, the State will discuss art. 641's requirement that the defendant presently have "the capacity to understand the proceedings." Second, the State will discuss art. 641's second requirement that the defendant presently have the capacity "to assist in his defense."

For comparison, art. 641 will be contrasted against the Ford standard as enunciated by Justice Powell in his concurring opinion to Ford. The condemned inmate must know of his impending death, and the reason for it. In the words of Justice Powell, the Eighth Amendment requires that the execution of death row inmates be stayed if they are "unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 106 S.Ct. at 2609.

A. The Ford dual-prong standard is the equivalent of the first element of art. 641, which requires the defendant to "understand the proceedings against him."

In his concurring opinion to Ford, Justice Powell used several key adjectives to help explain the type of insanity necessary before execution would be prohibited by the Eighth Amendment. The inmate must KNOW of his impending death and the reason for it. The inmate must PERCEIVE the connection between his crime and punishment. The inmate must be AWARE of his impending fate. Ford, 106 S.Ct. at 2608-2609.

Justice Powell also cited three states as being similar to the standard he endorsed. The state and its standard was: Florida, the inmate must possess the "mental capacity to UNDERSTAND the nature of the death penalty and why it was imposed" on them; Illinois, "A person is unfit to be

executed if because of a mental condition he is unable to UNDERSTAND the nature and purpose of such sentence"; and Connecticut, an inmate must be "able to UNDERSTAND the nature of the sentencing proceedings, i.e., why he was being punished and the nature of his punishment."

As pointed out, supra, Justice Powell also stated that case law throughout the country supported that the prevailing test is "whether the condemned man was AWARE of his conviction and the nature of his impending fate." Ford, 106 S.Ct. at 2608.

The leading case that gives meaning behind the art. 641 standard is Bennett, supra. Because this case analyzed art. 641 as the standard to determine whether a mentally retarded defendant was capable to proceed to trial on the merits, the case is not the appropriate mechanism by which to test art. 641 as the standard for a post-conviction proceeding to determine competency to be executed. However, because art. 641 has never been applied as the standard for execution competency, the State was left with no other alternative than to use Bennett.

In Bennett on rehearing , the Honorable Justice Dennis addressed the issue that mere existence of mental illness or mental retardation alone was insufficient under art. 641 to stay criminal proceedings against the defendant. Rather, under the two elements of art. 641, the mental illness must be 'so severe as to impair a defendant's capacity to understand the object, nature and consequences of the proceedings against him, to consult with counsel in a meaningful way, and to assist rationally in his defense, that defendant is, within contemplation of law, incompetent to stand trial." Bennett, 345 So.2d at 1136-1147. (Citations omitted).

From this excerpt of Bennett, "understand the proceedings" was equated with requiring the defendant to know the object, nature and consequences of the trial's outcome. When applied to a death penalty case, by analogy, "understand the proceedings" must also require the death row inmate to know the object, nature and consequences of the death penalty. This analogy of what Bennett would require in a death penalty setting makes apparent that the first element of art. 641 is identical to what the Ford standard requires.

Both art. 641's first element and the Ford standard would require the inmate to know or understand the death penalty, and the reason why it is being imposed upon him. In



other words, the condemned prisoner would need to know the object, nature and consequences of the death penalty. The terms common in both the Ford standard and the first element of art. 641 - knowledge, perception, understanding, awareness - all focus on the same, basic capacity. Both the first element of art. 641 and the Ford standard require the condemned prisoner to know, perceive, understand and be aware of his death by electrocution for the heinous crime he committed. Therefore, the art. 641 standard subsumes the Ford standard.

If art. 641 is applied to the case at bar, the petitioner under its first element would be required to understand the proceedings. In other words, he must know he will die by electrocution, and he must know the death penalty is being imposed upon him because he murdered five members of his family. This is identical to what the Ford standard requires. As argued previously, the petitioner clearly knows of his impending death and the reason for it. Therefore, the petitioner also clearly "understands the proceedings" as required by art. 641.

B. The second element of art. 641 requires that the defendant have the capacity to "assist in his defense." The State respectfully submits that this second element is unnecessary in a post-conviction proceeding because the issue of guilt or innocence has already been resolved. The question of the petitioner's execution is not IF, but WHEN.

While the second element of art. 641 requiring a DEFENDANT (i.e., an accused) to be able to assist in his defense is constitutionally mandated in a pre-trial setting, as Justice Powell suggests in Ford, infra, it is unnecessary in a post-conviction proceeding to determine competency for execution. When art. 641 was written, it was intended to ensure that a defendant received a fair and impartial trial as required by the Sixth Amendment. The art. 641 standard was intended for pre-trial application when the defendant was still presumed innocent. When that same art. 641 standard is applied post-conviction as a means to determine competency for execution, the standard's underlying purpose -- that is, to ensure that the defendant has a fair and impartial trial -- is no longer served. Instead, the standard is being applied to a condemned murderer whose sentence and conviction have been affirmed on appeal. Michael Owen Perry has already had his day in court. Michael Owen Perry has already had a fair and

impartial trial. Mandating the second element of art. 641 in a post-conviction competency for execution proceeding only defeats the State's compelling interest of finality.

Additionally, there is no support in this State's jurisprudence that the second element of art. 641 is mandated for a post-conviction, competency for execution proceeding. In Perry, supra, this Honorable court required that this petitioner "understand the death penalty" or have the "present capacity to undergo execution." Perry, 502 So.2d at 564. The Fifth Circuit in Lowenfield, supra, adopted the Ford standard in globo. The Allen case, supra, predates art. 641 by 23 years, and while the case cited art. 641's precursor, the Allen court never addressed the issue of a standard. Furthermore, the question presented to the Allen court was framed as "incapable of understanding the proceedings against him." Allen, 15 So.2d at 871. In no case and at no time has this Honorable Court ever suggested that the second element of art. 641 -- requiring the inmate to assist in his defense -- was part of a standard to determine post-conviction competency for execution.

Most persuasive is that this Honorable Court had this petitioner under review in Perry, and yet never cited art. 641 as the standard of competency for execution. The omission becomes even more flagrant because this Honorable Court predicted that a competency for execution proceeding might be necessary. In dicta, this Honorable Court addressed the petitioner's burden of proof in this matter, and required that the execution could not proceed unless the petitioner had the present capacity to "understand the death penalty" or to "undergo execution." Art. 641 WAS NOT cited as authority for these propositions. Also noticeably absent were the words of art. 641's second element: "assist in his defense." In summation, this analysis also shows a fatal flaw in opposing counsel's assertions. Our opponents can cite no Louisiana jurisprudence that requires the condemned inmate possess the capacity to assist in his defense before execution is allowed.

On the other hand, the State's position - that requiring the inmate to assist in his defense unnecessarily hinders the effective administration of criminal justice - is supported directly or indirectly by at least six justices on the highest court in this land. Justices Brennan and Marshall, who have expressly stated that they believe the death penalty is "cruel and unusual punishment" in ALL circumstances, have still, nonetheless, expressed support for the standard as enunciated by



Justice Powell in Ford, supra. Both Justices Brennan and Marshall cited Justice Powell's standard with approval in Johnson v. Cabana, supra. Justice Marshall in Ford also indirectly endorsed Justice Powell's standard in dicta by requiring an execution be stayed if the "prisoner's ability to comprehend the nature of the penalty" or "comprehending the reasons for the penalty or its implications" were absent. Ford, 106 S.Ct. at 2606

Most convincing is Justice Powell's concurring opinion in Ford where he addressed head-on whether a death row inmate must be capable of assisting in his defense before his execution could proceed. He answered with a resounding: NO.

To support his argument, Justice Powell recalled that Blackstone's Commentaries had recorded that execution of an insane man would be prohibited "if after judgment he became of non sane memory, his execution shall be spared: for were he of sound memory he might allege somewhat in stay of judgment or execution." Ford, 106 S.Ct. at 2607 (Court's emphasis.) In commenting on whether a condemned prisoner must be capable of assisting in his defense, Powell stated:

> "The first of these justifications (capacity to assist in his defense) has slight merit today. Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review. Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. Nor does the defendant merely have the right to counsel's assistance; he also has the right to the EFFECTIVE assistance of counsel at trial and on appeal. These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.
>
> In addition, in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself. Our decisions already recognize, however, that a defendant must be competent to stand trial, and thus the notion that a defendant must be able to assist in his defense is largely provided for." Ford, 106 S.Ct. at 2607-2608, (Court's emphasis, footnote and citations omitted).

In a footnote, Justice Powell noted that three states, Mississippi, Missouri and Utah, required that an inmate have the capacity to assist in his defense prior to execution. Powell countered:

> "The majority of States appear not to have addressed the issue in their statutes. Modern case authority on this question is sparse, and while some older cases favor the Blackstone view, those cases largely antedate the recent expansion of both the right to counsel and the availability of federal and state collateral review." Ford, 106 S.Ct. at 2608, footnote 3. (Citation omitted).

There is no doubt here that the petitioner has had access to numerous attorneys who have acted in his behalf, an issue which will be discussed in more detail in Argument XI, infra. The petitioner's commission of these five violent murders is beyond a reasonable doubt. His sentence and conviction have also been affirmed on appeal by this Honorable Court with writs denied by the United States Supreme Court. Also, unlike common law where execution quickly followed conviction and sentence, in 1987, of the 1,984 inmates on death row, each inmate could expect to spend an AVERAGE of 7 years and two months awaiting execution - a delay directly caused by additional appeals and review unknown and unimaginable at common law. (See Bureau of Justice Statistics, Capital Punishment 1987, Table 10, p. 9.) This petitioner has already been on death row 3 years and 3 months with habeas corpus review still forthcoming. To require that Blackstone's Commentaries of 18th century England be given full weight in late 20th century America seems ludicrous at best.

In the words of Justice Powell, insanity as defined in the context of competency for execution, would mean that the inmate could not understand the proceedings against him, essentially the first element of art. 641. However, this definition of insanity would not include the inmate's capacity to assist in his defense, the second element of art. 641.

Justice Powell also agreed that certain procedural bars, such as not mandating that a condemned inmate be capable of assisting in his defense, are constitutionally acceptable means to serve the State's compelling interest in finality.

In a footnote, Justice Powell explained:

> "Moreover, a standard that focused on the defendant's ability to assist in his defense would give too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false: we have made clear that States have a strong and legitimate interest in avoiding repetitive



> collateral review through procedural bars." Ford, 106 S.Ct. at 2608, footnote 2. (Citation omitted).

Therefore, Justice Powell intentionally designed his standard of competency to be executed without requiring that the inmate be able to assist in his defense. Therefore, under Powell's analysis, as adopted by Justices Brennan and Marshall, the Eighth Amendment does not require that the inmate possess the capacity to assist in the defense before he can be legally executed.

Chief Justice Rehnquist in his dissent in Ford also recognized the State's interest in finality. Citing Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950) and Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed.515 (1897) as authority, then Justice Rehnquist stated:

> "...Creating a constitutional right to a judicial determination of sanity before that sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law. The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus, necessitating another judicial determination of his sanity and presumably another stay of his execution." Ford, 106 S.Ct. at 2615 (Rehnquist, J., dissenting.) (Citations omitted).

Justice O'Connor in her concurring opinion in Ford, which was joined by Justice White, also addressed the State's interest in finality. For this very reason, Justice O'Connor stated that the demands of due process are much less post-conviction than they are prior to conviction. She wrote:

> "The prisoner's interest in avoiding an erroneous determination is, of course, very great. But I consider it self evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can NEVER be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very

moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process clause imposes few requirements on the States in this context." Ford, 106 S.Ct. at 2612. (Court's emphasis, citations omitted).

The State respectfully submits that by expanding the Ford standard to include art. 641's second element of requiring an inmate be capable of assisting in his defense, ignores the State's compelling interest of finality, as recognized most recently in the context of competency for execution by Justices Brennan, Marshall, Powell, Rehnquist, O'Connor and White.

Commentator Weihofen in Mental Disorder as a Criminal Defense (1954) directly addressed the issue of incompetency after death sentence 35 years ago. He said that the common law provided a stay of execution because of post-conviction insanity only in capital cases; there was no similar provision for staying a sentence where punishment was for a term of imprisonment. Weihofen's views provide additional support for Justices Powell and Rehnquist's position that assisting in his defense should not be mandated for a post-conviction proceeding to determine competency for execution. In discussing whether a death row inmate should be required to assist in his defense, Weihofen cited a previous work he had jointly authored:

> "'To try a person when he is too disordered mentally to defend himself is palpably unfair and can be said to deny him his constitutional rights to a fair trial. But after the trial is over, after the jury has heard all that the defendant may have to say in his defense, after the punishment has been legally assessed and all permissible appeals are finished, no question of fair trial remains. Mental disorder arising therafter (sic) cannot raise any new question touching guilt or the propriety of the punishment. The suggestion that ''he might have offered some reason, if in his senses, to have stayed these...proceedings'' is unconvincing; he has had his chance to show such reasons, and ordinarily he would not now be allowed to reopen the trial to advance such reasons even if he were sane. New facts, such as the issuance of a pardon, will be at least as well known to his counsel as to himself, and can be pleaded for him without his help'" Mental Disorder at 464. Citing from: Guttmacher and Weihofen, Psychiatry and the Law (1952), p. 434.

Weihofen suggested that a state legislature should be allowed discretion to determine appropriate procedures as necessary for post-conviction proceedings to determine competency for execution. He wrote:



> "There is no constitutional right to a jury trial. There was no right to a jury at common law; the mode of trial was within the discretion of the court. This is not a criminal trial, for guilt has already been determined. The proceeding is a civil one to determine the incidental question of the condemned person's present mental competency to understand the nature and purpose of the punishment to be executed upon him." Mental Disorder at 466. (Footnotes omitted).

Historically speaking, the State's interest in finality was recognized both by the United States Supreme Court and this Honorable Court as far back as the late 19th and early 20th centuries.

In Nobles v. Georgia, supra, the United States Supreme Court in 1897, addressed the issue of whether a condemned inmate, after trial and conviction, was entitled to a jury trial on a present claim of insanity. Answering in the negative, the court quoted Blackstone as providing:

> "'the rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial and it isn't the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice...'" Nobles, 18 S.Ct. at 91.

The Louisiana Supreme Court in ex rel. Lyons v. Chretien, 38 So. 27 (La. 1905) addressed the importance of finality. In that case, the relator had been convicted of murder and sentenced to death. The relator, through his counsel, then petitioned the trial court that he was presently insane, and requested the appointment of a lunacy commission. The relator also suggested that after a trial on the issue of sanity, if it was determined that he was insane, he should be sent to a state mental hospital until cured. The trial court denied the relator's petition. On appeal to the Louisiana Supreme Court, the court held it had no jurisdiction to review the trial court's decision in this matter and therefore, the relator's request for writ of mandamus was denied.

In ex rel. Lyons, the Court cited Act 105 of 1896, the precursor to Act 261 of 1918, discussed, supra, which provided for the interdiction of death row inmates. The court said that the removal of a prisoner under Act 105 was purely at the trial court's discretion.

"In such cases, if the judge be satisfied that the convict has become insane since his imprisonment, he orders the removal of the convict from the penitentiary to the asylum for the insane, to be there detained and treated until he shall recover his sanity. It is obvious that to permit convicts to arrest the execution of sentences imposed on them by demanding, as a matter of legal right, the appointment of medical experts to examine into their mental condition, would be tantamount to granting them the privilege of thwarting the administration of criminal justice for an indefinite time. The act of 1896 does not grant any right to convicts to initiate such proceedings, but the matter is left to the discretion of the warden of the penitentiary. Reasoning from analogy, a similar initiative should be left to the custodian of convicts sentenced to death. If persons under sentence of death appeal to the courts or to the executive department for a suspension of sentence on the ground of alleged insanity, it is discretionary with the court or the executive to take action in the premises. It has been held in other states that in such cases the question is not one of legal right, but of humanity, and that the ruling of the court is not reviewable by appeal or writ of error...If such a ruling be reviewable by this court, then there is nothing to prevent other similar applications and other appeals by relator, resulting in the indefinite postponement of the execution of the sentence of death pronounced against him." ex rel. Lyons, 38 So. at 27-28.

The reasoning in ex rel. Lyons although more than eight decades old, carries true to the case at bar. The question post-conviction is not to re-litigate the petitioner's guilt or innocence. As Justice Powell himself pointed out, the question is not IF the petitioner will be executed. The question is WHEN.

At least one other state, as well, has addressed that state's interest in finality in its positive law. An Alabama statute, which was cited by opposing counsel in their brief, recognized the state's compelling interest of finality. Ala. Stat. §15-16-24 authorizes suspending a condemned prisoner's execution, but only until sanity is restored. The statute further provides:

> "This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge. No court or judge in this state shall have the power or right to suspend the execution of sentence of any other court of record on account of the insanity of the convict. This section shall not prevent the judge or court from impaneling a jury to try the question of insanity or from examining such witnesses as he may deem proper for guidance."



Thereby, Alabama, in its positive law, has legislatively protected its interest in finality. In a post-conviction proceeding, the death row inmate has one chance and one chance only to raise the question of insanity arising subsequent to conviction as a bar to his execution. That ruling is precluded from any further judicial review. The statute recognizes the prisoner's keen interest of causing unnecessary delay as a means of escaping his punishment.

In Louisiana, if the procedural pre-trial art. 642 is interpreted as applicable post-conviction for proceeding to execution, a conflict with Louisiana's compelling interest of finality similar to the one Alabama attempted to avoid is created. Under the procedural pre-trial art. 642, the death row inmate could repeatedly raise the incompetency issue provided a reasonable ground was established. The State respectfully submits that this is just another example of where the analogy of a pre-trial article for capacity to stand trial to a post-conviction competency to be executed setting breaks down. Such an open-ended statute as art. 642 used in the post-conviction proceedings for execution does not recognize the State's legitimate interest of finality.

Lastly, by mandating the inmate be capable of assisting in his defense, this argument ignores that the inmate's best defense at this stage of his criminal proceedings IS HIS INSANITY. In other words, an inmate can best "assist" his counsel by being insane. Therefore for a truly meritous claim of insanity post-conviction, sheerly the inmate's presence is the best possible assistance he could offer to his counsel. While mere presence of an incompetent defendant pre-trial could never pass constitutional muster, mere presence of the incompetent condemned inmate post-conviction is the best possible defense.

VIII. ALTERNATIVELY, IF THIS HONORABLE COURT WOULD RULE THAT ART. 641 IS THE STANDARD OF COMPETENCY FOR EXECUTION IN LOUISIANA, THE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT, BECAUSE OF HIS MENTAL ILLNESS, HE HAS BECOME INCOMPETENT SUBSEQUENT TO CONVICTION. EVIDENCE TO THIS POINT CLEARLY SUPPORTS A FINDING THAT THE PETITIONER UNDERSTANDS THE PROCEEDINGS AGAINST HIM AND THAT HE IS ABLE TO ASSIST IN HIS DEFENSE.

For the sake of argument, the State will assume that the petitioner's counsel is correct in that the standard of competency for execution in Louisiana is art. 641. Therefore, under art. 641, the petitioner must prove by a preponderance of the evidence that subsequent to his conviction on October 31, 1985, he has lost the capacity to understand the proceedings and assist in his defense.

The prior Arguments I through VII have all addressed the issue of whether the petitioner understands the proceedings. Because the Ford standard and the first element of art. 641 are identical, the answer under either standard must also be identical. All arguments, supra, that applied to the Ford standard apply with equal weight to the art. 641 requirement to "understand the proceedings." Testimony to this point in the State's brief has shown that Michael Owen Perry doesn't want to die. (R., p. 0760). Dr. Jimenez testified that Perry knew his case might go to the United States Supreme Court and that he could not understand how Charles Manson stays alive when he, Perry, killed "only" five and is sentenced to die. (R., p. 0758). Dr. Kovac said Perry knows if he takes his pills, he'll die; otherwise, he lives. (R., p. 0717). Experts (Dr. Jimenez, R. p. 0531; Dr. Cox, R. p.p. 0556-7; and Dr. Vincent, R. p.0590) all gave testimony that supports a finding that the petitioner is competent to be executed under the first element of art. 641. Michael Owen Perry understands the proceedings: He knows of his impending death and the reason for it.

Because the State has exhaustively covered this issue, the remaining portion of this argument will focus on whether the petitioner is competent for execution under the second element of art. 641. The question the State now intends to answer is whether Michael Owen Perry is capable of assisting in his defense?



A. Under art. 641, the petitioner must prove it is more probable than not that he is incapable, because of his mental illness, of assisting in his defense. Petitioner's stagnant medical diagnosis and stale evidence proves only that his competency is unchanged.

Important for this Honorable Court's consideration at this point is to respectfully be reminded that the petitioner suffers from the same mental illness today as he did during the pre-trial criminal proceedings. No new evidence has been admitted. Petitioner's sanity as far as criminal responsibility and capacity to stand trial are sealed issues. The petitioner, although mentally ill, was determined by two sanity commissions utilizing art. 641 to be competent to stand trial. On October 31, 1985, Michael Owen Perry understood the proceedings against him and was capable of assisting in his defense. That conclusion was affirmed by this Honorable Court in Perry, supra, and was followed by denial of writs by the U.S. Supreme Court.

This brief has already proven that Michael Owen Perry is PRESENTLY capable of understanding the proceedings against him. The ONLY question remaining is whether Michael Owen Perry has lost his capacity to assist in his defense since October 31, 1985. The following argument will prove to this Honorable Court that he has not. Therefore, even measured by the art. 641 standard, the petitioner is competent to be executed and the trial court's ruling must be affirmed.

Because on October 31, 1985, the petitioner satisfied the art. 641 standard, the findings of the sanity commissions deserve a presumption of correctness. In light of this presumption, counsel for the petitioner have produced no new evidence that proves by a preponderance his insanity subsequent to conviction. Much of the evidence (such as medical reports from Central Hospital and Feliciana Forensic Facility) pre-dating the trial, has already been disregarded by two sanity commissions as not sufficient proof of incompetency, and therefore, cannot be considered as establishing post-conviction insanity. The best evidence the petitioner's counsel produces is a biased selection of medical reports from Angola, the latest of which is more than a year old. This evidence is highly suspect as to the inmate's PRESENT mental capacity, which is the ONLY concern here. The petitioner's evidence is simply old news.

However, the most recent evidence - the testimony of witnesses - clearly supports the trial court's finding that the petitioner is competent to be executed. This expert testimony, unlike the petitioner's evidence of stale medical reports, is the latest word on the petitioner's competency, taken at hearings before the trial court on April 20, September 30 and October 21, 1988.

The latest evidence of the petitioner's ability to assist in his defense is most clearly supported by his own actions. Together with his counsel, Michael Owen Perry has voluntarily chosen to forego medication. The result is that his disorder, Schizoaffective Disorder, goes untreated and he manifests symptoms. Dr. Cox testified that Schizoaffective Disorder is a malady similar to diabetes; it can be controlled through medication, but there is no cure. (R., p. 0553). Refusing medicine for Schizoaffective Disorder could be likened to a diabetic who refuses his insulin shots. Untreated diabetes results in the patient's death; untreated Schizoaffective Disorder may result in legal insanity and a loophole to execution. Michael Owen Perry and his counsel have therefore made a calculated decision: by refusing medication, insanity may be induced and the petitioner will be incompetent for electrocution. (R., p. 0551).

If Perry was truly unable to assist counsel, this scheme would be impossible to carry out. Based on these facts, the State respectfully submits that this Honorable Court can reach no other decision than that the petitioner has assisted in his defense. The evidence speaks for itself. Because the actions of this petitioner to assist his counsel are directly aimed at manipulating the criminal justice system, he is clearly assisting in his defense, and therefore, is competent for execution.

B. The "Bennett" test, while in part is clearly irrelevant to determine competency for execution, is flexible, especially if abuse of the criminal justice system is shown.

As stated in Argument VII, supra, Bennett is the leading case on interpreting the two elements of art. 641. However, that tool is awkward and inappropriate in determining competency for execution because it was designed for an entirely different purpose, and was never intended to be used for this purpose. Nonetheless, the State has no alternative but to rely on Bennett IF art. 641 is the chosen standard.



All questions posed by Bennett go to the single purpose of deciding whether a defendant has the mental capacity necessary to receive a fair and impartial trial. Hence many of the questions asked in that context are clearly irrelevant to the execution issue presented by this case. Therefore, the State will only address questions that could reasonably be considered appropriate for determining competency for execution. This will be done in Argument VIII C, infra.

As a foundation to the Bennett argument, the State would like to point out that jurisprudence has stated that the Bennett test even in a pre-trial setting, is a flexible test, especially if rascality is detected on part of the defendant.

This State's jurisprudence which has applied the test as first outlined in Bennett clearly indicates that Bennett is not a rigid, unbending mold into which every defendant must precisely fit, even in the pre-trial setting. For example, in State v. Burnette, 337 So.2d 1096 (La. 1976), this Honorable Court declined to allow a defendant to intentionally defeat the art. 641 standard by his disruptful courtroom behavior. In this case, the defendant had been convicted of armed robbery. In addition to other issues not pertinent here, this court held that the trial court did not abuse its discretion by failing to appoint a lunacy commission to determine the defendant's capacity to stand trial.

In Burnette, the defendant threw an ashtray, striking the trial judge, and repeatedly cursed at the judge. By observing the defendant for three days, the trial court concluded that the defendant was clearly competent to stand trial. This Honorable Court, in supporting the trial court's decision, quoted the words of the trial judge to justify its decision. The trial judge said:

> "'The court is convinced that there is no insanity involved, that the only thing involved is INTENTIONAL INTENT TO DISRUPT THE JUDICIAL SYSTEM, which the court will not allow and will not subvert it by granting a motion of this type, and I deny the motion.'" Burnette, 337 So.2d at 1101. (Emphasis supplied).

The Bennett test was again flexible in State v. Rochon, 393 So.2d 1224 (La. 1981). This Honorable Court ruled that even though the Bennett test was not met completely, the trial court still did not abuse its discretion in refusing to issue a mistrial on a claim that the defendant was incapable of standing trial. This Court stated:

> "On the basis of the evidence, it is difficult to say that the trial court abused its discretion in concluding that the DEFENDANT'S ABERRANT BEHAVIOR AND APPARENT UNRESPONSIVENESS FORMED A DELIBERATE SCHEME on his part to prevent further proceedings against him. Though the trial court was unable to delve into all the factors enumerated by Bennett, this inability was clearly attributable to the accused, who seemed quite capable of assisting in his own defense. Under these circumstances, the trial court's refusal to order a mistrial on grounds of defendant's incapacity was not erroneous." Rochon, 363 So.2d at 1230.

The Rochon court had affirmed the conviction and life imprisonment sentence of a defendant for aggravated rape. The defendant Raymond Rochon suffered from a psychotic illness, and two sanity commissions had found him incompetent to stand trial. Rochon was sent to the Forensic Division of East Louisiana State Hospital for treatment. Rochon's mental illness was subsequently brought under control by medication, and he was later found to have regained his competency to stand trial. During jury selection, Rochon repeatedly interrupted the proceedings with disruptive and bizarre behavior even after warnings from the trial court. For instance, after being charged with contempt outside the jury's presence, Rochon responded by lifting his shirt and scratching his navel.

During the trial itself, Rochon again interrupted the courtroom proceedings by removing all his clothes in open court. He was again charged with contempt, and he, accompanied by his attorney, was removed from the courtroom to an adjacent room equipped with an intercom system which monitored the courtroom proceedings.

Upon motion of Rochon's counsel for a mistrial, the State requested that the three members of the prior sanity commission re-examine Rochon. Two of three concluded the defendant was capable of standing trial. One doctor admitted he believed the defendant was acting bizarre in a deliberate attempt to halt criminal proceedings against him. Another doctor testified that Rochon was refusing to assist his attorneys, not that he was incapable of assisting his attorneys, and that he was "willfully refusing to cooperate" with the doctors during questioning. On this evidence, the trial court denied Rochon's motion for a mistrial and ruled that he was competent to stand trial. Rochon, 393 So.2d at 1225-1230.

In State v. Lawrence, 368 So.2d 703 (La. 1979) a



slightly mentally retarded defendant had originally been determined incompetent to stand trial, but like Rochon, following treatment, his competency was regained. This defendant had pled guilty to second-degree murder and had reserved his right to appeal the issue of his competency to stand trial. On appeal, this Honorable Court affirmed his conviction, ruling that he had been competent to stand trial. In addressing the issue of whether or not the defendant was capable of assisting in his defense, this Court considered expert testimony which stated that the defendant's silence was intentional on his part. The Court said:

> "The facts of the case are not particularly complex, and Lawrence's defense would apparently have turned on whether he knew of the murder plot and on the extent to which he actually participated in it. The defendant's recorded statements were available to the defense, as was the testimony from the trial of David Albert. [(Editor's Note: Albert was charged with first-degree murder in the same case).] The addresses of the principal witnesses Tobe Roberts and David Albert, were known to the defense. Although there is some evidence that Lawrence mistrusts his own memory and must have additional time to decide what response he will make to a given inquiry, the trial court apparently accepted Dr. Osborn's testimony that the defendant COULD COMMUNICATE WITH THE ATTORNEY IF HE WISHED. Moreover, the defense argument that Lawrence would not be able to notify his attorney of distortions or misstatements in the testimony of other witnesses is not such an important consideration if the defendant has already made numerous statements about the events in question." Lawrence, 368 So.2d at 703. (Editor's note; emphasis supplied.)

These three cases - Burnette, Rochon and Lawrence - indicate that the Bennett test is just a guide, and that the facts and underlying motives of the defendant are determinative factors when applying the art. 641 standard.

This jurisprudence supports the State's argument that Michael Owen Perry, at the behest of his counsel, has attempted to manipulate the criminal justice system and use the art. 641 standard as the defense strategy to avoid execution. By voluntarily withdrawing medication, the petitioner can use his mental illness as a means to create legal insanity, if measured by art. 641.

The petitioner is far from stupid. He has normal intelligence, and dropped out of college after earning 13 semester hours of credit. See Perry, 502 So.2d. at 522. The petitioner and his counsel know exactly how they can, at this point, escape the petitioner's valid death sentence. The

moretimes Angola personnel report psychotic delusions and hallucinations, bizarre outbursts, rambling speech and loose associations, the greater the petitioner's chances become to be declared legally incompetent for execution. That's exactly why the petitioner's counsel admitted Angola medical reports into the record, supplemented by numerous biased charts in the petitioner's brief. (Pet.'s brief, pp. 38-40, 43-33, 46-49, 71-78a). The sole purpose of these charts is to highlight the proper buzz words: Psychotic, delusions, hallucinations, etc. The charts provide no detailed analysis of the petitioner's mental capacity. An unmedicated Michael Owen Perry has the best shot at defeating the art. 641 standard. That's precisely the reason his attorneys told Perry to stop all medication.

Because of this deliberate attempt to manipulate the criminal justice system, the Bennett test as applied to this petitioner, and as this State's jurisprudence authorizes, should be applied with a flexibility that prevents the system's perversion. Art. 641 would seem to carry with it an underlying presumption that the mental disease or defect that creates incapacity is BEYOND the defendant's own control. Hence, because this petitioner and his counsel have deliberately tried to induce insanity by withdrawing the petitioner's medication, on the authority of Burnette, Rochon and Lawrence, the State respectfully urges this Honorable Court to apply the Bennett test accordingly.

Proof of Mr. Nordyke's deliberate legal strategy to frustrate the art. 641 standard is found in his letter dated March 14, 1988. The trial court denied the State's request to admit that letter into evidence. However, that evidence is sealed, and the State respectfully requests this Honorable Court to open it during this appellate review. (R., pp. 689-691).

C. In the case at bar, petitioner's assisting in his defense is best shown by his own words and actions. Considering the relevant questions "Bennett" asked in regard to art. 641's second element of assisting in his defense, the petitioner is competent to be executed.

The State respectfully suggests that the best indicator of whether or not the petitioner is assisting in his defense should be judged by his own words and actions. Dr. Kovac's testimony that the petitioner has voluntarily chosen to



forego medication AT THE ADVICE OF COUNSEL is clear proof that the petitioner has assisted in his defense. (R., pp.0717-18). Dr. Jimenez testified also that Perry was acting ON THE ADVICE OF HIS LAWYERS by refusing medication. (R., p. 0754). Medical reports further corroborate this scheme between Perry and his counsel. (R., pp. 0180-8). Acting in concert with his counsel, the petitioner systematically has refused medication.

The September 30, 1988 hearing transcripts prove that the petitioner was paying attention to the proceedings and attempted to assist in his defense. During Dr. Kovac's testimony, the petitioner made an outburst and was reprimanded by the trial court.

[By The Court:]

Q. And yesterday did you have a conversation with him?

A. I just mainly sat and listened to he and the social worker discuss.

Q. And what was discussed? What did Mr. Perry say then?

A. I just mainly talking more about how he was feeling and...

Mr. Nordyke:
I think that I need to object to the entire line of questioning for several reasons. And let me go ahead and...

* * *

The Court:
The objection is noted and overruled.

Mr. Nordyke:
To which ruling of the court I would respectfully object and assign error.

Mr. Perry:
Well, I told...

Mr. Nordyke:
Michael, be quiet.

Mr. Perry: Ms. Kovac that the voices make me do it...

Mr. Nordyke:
Mr. Perry, be quiet.

Mr. Perry:
...you know...

The Court:
Talk with your client. I want him here in court if possible but I'm not going to let him interrupt the proceedings. I will take him into the holding cell and we will pipe the hearing into the holding cell so that he can hear. But I'm not going to entertain any more outbursts.

Mr. Ciarrusso:
Thank you.
(R., pp. 0718-0721).

Perry also had the opportunity to "act crazy." As has been pointed out, supra, Dr. Jimenez testified that the petitioner is smart enought to act crazy; he is very much aware of Charles Manson, and many of his expressions were similar to those made by Manson. (R., p. 0758).

The petitioner was called to the stand at the April 20, 1988 hearing. (R., p. 0662). Under direct examination by Mr. Nordyke, Perry performed his role well. Counsel asked suggestively bizzare questions and he was allowed to ramble, and make bizarre and nonsensical statements. Defense counsel had deliberately ordered their client removed from medication in anticipation of this court appearance. (R., pp. 0181-2).

However, under cross-examination by State prosecutor Salomon, the petitioner was able to recall past events and testify to them accurately.

[By Mr. Salomon:]

Q. And do you have a brother, Ronnie?

A. He's dead, uh, he's supposed to be coming back in twenty years. He doesn't like to fight.

Q. How did he die?

A. He fell from a rig there. You read about that.

Q. And where was that rig?

A. Wax Lake. I went -- we picked up the stone like you said.

Q. Now do you know Zoola? (sic)

A. Yes, I know her.

Q. Who is she?

A. She's the one that kept harassing me at the jail. Now I don't like to cuss or anything 'cause Captain Arnold he taught me that. And he taught me how to be good, you know.

Q. Is she related to you?

A. She's my aunt.

Q. Okay, and whose sister is she?

A. She's my mother's sister. She's the one that did it first 'cause she was rich. But she didn't know what she was doing.

Q. Do you know her -- what's her husband's name?



A. Emery Lyons.

Q. Okay. And do you know what town they live in?

A. Welsh, (sic) Louisiana.

Q. And do you know if you have any brothers and sisters besides Ronnie and Susan?

A. Uh, I know I got one but I'm not telling you any names. She told me she don't like you because you convicted her of murder.

Q. Do you know Debbie Perry?

A. Yes, she's a murderer, too. She never stopped.

Q. Is she related to you?

A. Yes, she's my sister-in-law. She's the one that did it, she's the one that...

Q. And how was she -- who was she married to that makes her your sister-in...

A. She married my brother, Ronald Adam Perry.

Q. Okay. And do you remember where the electric chair is?

A. No, never...

Q. Have you ever seen it?

A. I know where mine is, it travels around. I mean I gave that away, I mean, you know, they said it would be back in twenty years, you know. It don't like to cry, it's got a mind of its own. That's a killing son-of-a-bitch. I mean...

Q. Do you know what death by electrocution means?

A. Dead like a son-of-a-dead like a doornail, destruction of the world.

Q. Do you want to die by electrocution?

A. No, sir, I'd rather be hanged by the neck until dead.

Q. And why is that?

A. 'Cause that's what my mother told me to say.

Q. And do you know, Michael, when your brother was born?

A. He was born January the 5th, 1954. He was eleven months apart, we're tight, man. And he took the ...

* * *

Q. Michael, did you go to school in Jefferson Davis Parish?

A. Yes, thirteen years.

Q. Did you go to a high school?

A. Yes, Lake Arthur High School.

Q. And did you graduate?

A. Sure did, got a turquoise ring. I threw it over the bridge on my way over here so I could dive for it later where they built it, you know, ninety years it took.

Q. Well, what about, Michael, did you play in the band?

A. I was a trumpet player, I'm a member of the Great Pretenders. We make ninety million dollars a day.

Q. And, Michael, besides playing trumpet in the band did you play any sports?

A. I played every football player in the world, every track, everything in the world, sir. That's what I remember. I mean I did it to my best abilities, you know, 'cause I wanted to please the court before I got here.

Q. Michael, do you remember -- have you ever been to Washington, D.C.?

A. I been there three times. I went to the Library of Congress every time.

Q. And do you remember the Annex Hotel?

A. That's where I stayed for two weeks, the best time of my life.

Q. Do you remember how long or where is that...

A. I was supposed to spend six weeks but that's where they arrested me at, that's where you got me at. I remember you hired the secret service for me, you know.

Q. Do you remember what floor your room was on?

A. Oh, it was on the first floor.

Q. Do you remember -- did you have any T.V.'s?

A. Oh, I had all kinds of T.V.'s, man, that's when I heard about the murder victims.

Q. And how many T.V.'s do you remember having?

A. Oh, man, about seven.

Q. Okay. Do you remember how big those T.V.'s were?

A. They were portable.

Q. Okay. And do you remember where you got them from?

A. At the hock shop.

Q. Okay, do you remember how far that was from the hotel?

A. A half a block.



Q. And how did you get from Louisiana to Washington D.C.?

A. In my mother and daddy's car, they let me use it one time. That was the best car they ever had. And my daddy wants it back.

Q. What kind of car was that?

A. Oldsmobile, that's all I know about it for now.

(R., pp. 0677-78; 0678a; 0679).

Mr. Nordyke also apparently acknowledges that his petitioner is assisting in his defense. Petitioner's counsel, however, took this point to the extreme. Mr. Nordyke took away any remaining shed of the petitioner's human dignity when he called his client "an exhibit."

Mr. Nordyke:
We will call Mr. Perry as an exhibit.

The Court:
If you would step up, please.

Mr. Salomon:
As an exhibit or as a witness?

The Court:
He's being called as a witness. If you would raise your right hand and be placed under oath, please.

Mr. Perry:
I can't do that but I'll try my best.

The Court:
That's good enough.

(R., p. 0661; emphasis supplied).

Instead of properly calling the petitioner to the stand as a witness, Mr. Nordyke preferred to classify his client as "an exhibit," as if a court of law was a side-show at the circus. This behavior of Mr. Nordyke is inappropriate. Yet it does establish defense counsel's recognition that Perry is assisting them in his defense.

To better effectuate the petitioner's assistance with the defense, Mr. Nordyke had sought his appointment as "do-gooder" in the petitioner's behalf. (R., p. 002). This method gave Mr. Nordyke the power to control the petitioner's medication, and thereby, increase his odds of winning against the death penalty. All the petitioner's medical and legal interests were then vested in one man whose only goal in the case at bar is to beat the death penalty at all costs. That is precisely why, in the "best interests" of his client, Mr. Nordyke ordered the petitioner to refuse medication, despite

medical doctors who had advised otherwise. (R., pp. 570-571; 086). This refusal is the means to induce a calculated insanity and escape execution. The "do-gooder" role played by Mr. Nordyke also would be totally undercut if the petitioner was truly unable to assist. This relationship between Michael Owen Perry and Keith Nordyke only proves that Perry has been assisting Mr. Nordyke in his defense. The orders were made, and the orders were carried out; without the latter, the former would be wasted breath.

Subsequently, Mr. Nordyke has been removed as "do-gooder." (R., p. 0003). The State respectfully submits that this was but another example of defense counsel Mr. Nordyke's attempting to manipulate the criminal justice system.

The test in Bennett for assisting in one's defense includes the following questions: "whether he (the defendant) is able to recall and relate facts pertaining to his actions and whereabouts at certain times...; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements...; whether, if necessary to defense strategy, he is capable of testifying in his own defense..." Bennett, 345 So.2d at 1138.

Other Bennett questions such as locating witnesses, maintaining a consistent defense, simple decision-making as to pleas, and mental deterioration under stress of trial, are clearly irrelevant when the issue is competency for execution. Therefore, these questions will not be discussed.

As far as the questions asked by Bennett that may apply, the State respectfully contends that Perry has done these things. Under cross-examination by Salomon, supra, the petitioner showed he could recall past events. Perry's interruption of Dr. Kovac's testimony, supra, proved he was following the proceedings, and could tell his attorneys his side of the story. And Perry testified in his own behalf. Therefore, under the relevant questions of Bennett, the petitioner is assisting in his defense.

Expert testimony by Drs. Cox and Vincent indicated that the petitioner could not meet the Bennett criteria, (R., pp. 0738, 0629). As argued previously, the flaws in such a test, designed for a pre-trial application on the question of whether or not the defendant is competent to stand trial, but used to a post-conviction application on the question of whether or not the condemned prisoner is competent to be



executed, are apparent. The Bennett test as written would defeat the whole purpose of Justice Powell's concurring opinion in Ford. That is, to define insanity IN THE CONTEXT of which it arises. Bennett defines insanity as a suspension to standing trial; it does not define insanity as a stay to execution. The experts have been using a tool for a purpose for which it was not designed. Hence, the value of their testimony here is highly suspect and is not an accurate indicator of how well the petitioner was assisting in his defense. The more accurate indicator is to examine their reports from their observations of Perry including Perry's comments and answers to their questions, rather than their legal conclusions.

The trial court also instructed the experts to examine the petitioner according to the Ford standard; hence they were never instructed on what, if any, of the Bennett criteria applied.

D. Opposing counsel has attempted to manipulate the criminal justice system by ordering the petitioner to forego medication in spite of their knowledge that the petitioner responds favorably to medication. Now those same attorneys want to benefit from that order by petitioning this Honorable Court to find that their client cannot assist in his defense.

As stated supra, the petitioner's counsel is manipulating the criminal justice system by advising their client to stop all medication in a conscious attempt to fail the art. 641 standard. The doctors have testified that the petitioner responds to the regular administration of Haldol (one shot a month plus oral medication three times a day). (R., pp. 0753-4). The doctors also have testified it is in the petitioner's best interest to be medicated. (R., p. 0557). However, petitioner's counsel is so vehemently opposed to the death penalty that they are willing to sacrifice their client's sanity for their own moral crusade of opposing the death penalty at all costs.

At the same time that opposing counsel have ordered Michael Owen Perry to stop all medication, they now complain that Perry cannot assist them in his defense. They know the petitioner responds to medication. (R., p. 0557). They know that the petitioner's mental state only improves with medication. (R., p. 0557). They know that the medication is

in the petitioner's best interest. (R., p. 0557). Opposing counsel now has the audacity to petition this Honorable Court that the petitioner cannot assist them in his defense. In other words, opposing counsel knows that medication will better enable Perry to be of assistance, yet they order him to stop medication, and then they petition this Court to declare him incompetent because he cannot assist in his defense. The State respectfully requests that opposing counsel not benefit from such a perversion of the criminal justice system.

The only purpose behind recommending the medication be foregone is to defeat the death penalty. Opposing counsel are gambling that by advising the petitioner to refuse his medication, they can thereby induce insanity and "win one" against the death penalty. In effect, petitioner's attorneys have taken it upon themselves to sentence the petitioner to spend the rest of his normal life - perhaps 40 years or more - incarcerated and insane, by advising him to forego the advances of medical science to control his mental illness, or worse yet, to deny medication during this competency proceeding, but give him medication after the death penalty has been avoided. In contrast, this same counsel in their brief described in nauseating detail the horrors of the world that torment the insane. Ironically, they invite their client to enter that world by inducing insanity. This anomaly casts doubt on the sincerity of counsel's "confessed" conviction in support of the historical reasons why insane prisoners were not executed. Petitioner's counsel will sacrifice their client's sanity as long as they are victorious in suspending or perhaps extinguishing, a validly imposed death sentence.

Obviously, the respondent is not so foolhardy as to suggest it is in the petitioner's "best interest" to be electrocuted. However, the choice was not one the respondent made. The State Legislature and the petitioner made that choice together. The State Legislature joined the majority of the states in this nation when it enacted the death penalty in R.S. 14:30. The petitioner forfeited his life when he, in cold-blood, executed five members of his family. The respondent's duty now to the people of Louisiana is to seek retribution and deterrance. That will only be achieved by the petitioner's execution.



F. Alternatively, if this Honorable Court decides the petitioner is incapable of assisting in his defense, the State contends that petitioner is not incapable, but rather has refused to assist in his defense by voluntarily withdrawing his medication. Art. 641's underlying presumption is that "incapacity" must be beyond the defendant's control.

In Rochon, supra, this Honorable Court made a distinction between incapable of assisting in one's defense, as required by art. 641, as opposed to refusing to assist in one's defense. At this point, the State respectfully submits that Michael Owen Perry is not incapable of assisting in his defense under art. 641. He has REFUSED to assist in his defense.

Perry has chosen to forego ordered medication in order to convince a judge he is crazy. (R., p. 0754). Testimony clearly indicates that Perry only improves with medication. (R., p. 0557). Therefore, when Perry made the decision to stop his medication, at that point, he REFUSED to assist his counsel further in his defense.

The Rochon case, supra, has many similarities with the case at bar. There the defendant had a mental illness that was controlled by medication. There the defendant embarked on a deliberate scheme including aberrant behavior and unresponsiveness. There this Honorable Court ruled that the defendant was not incapable under art. 641 of assisting in his defense; he had refused to assist in his defense.

Dr. Jimenez reported she had found refusal on Perry's part.

[By Mr. Salomon:]

Q. Doctor, I don't mean to seem as I'm delving off but is there a difference -- or I mean do you have an opinion on whether in this universe there is a thing known as free will or that each of us as individuals have a volitional ability or a nature to our character?

Mr. Nordyke:
Judge, this is philosophy as opposed to to psychiatry now, I believe. And I would object to the question. I'm not sure it's relevant at all to whether or not Michael is sick.

Mr. Salomon:
Your Honor, if I might respond. I think that a question of free will in this case goes to the heart of the matter before the Court. And there is a distinct purpose in mind that I have in asking the question. I have a follow up that

comes and I think the Court will recognize addresses the central question we're confronting today.

The Court:
What might that follow up question be, Mr. Salomon?

Mr. Salomon:
The followup question would be to Dr. Jimenez is there a difference between her conclusion of Michael Perry is unable to assist versus Michael Perry refusing to assist counsel. And free will would determine more in line that he is refusing to assist his counsel rather than he is unable to assist. A semantic distinction on the surface but one I think that is valid in the long run.

The Court:
I overrule the objection.

Q. Doctor, do you have any opinion or belief in any person whether they're mentally ill or suffer from any kind of disorders, personality, Schizoaffective, do we have free will?

A. Yes, sir.

Q. And can you see my distinction? Is it possible that Michael's ambivalence, as you term it, is more in line with a refusal to cooperate, a refusal to assist, rather than, as you put it, he is unable to assist?

A. There is a certain degree of refusal and there's also a certain degree of inability. It's very difficult, and that's the reason why I suggested that I would feel more comfortable if this man were better medicated and better, uh, in a better frame of mind than he is now. Although he does understand that he killed his family and he does understand that he is getting the chair for that crime.

Q. Okay. And you have made those determinations pursuant to your interview that he understands why he's being penalized why he incurs and is going to suffer the penalty of death?

A. Yes, sir, based on my evaluation that's the conclusion I arrived at.

(R., pp. 0532-34; emphasis supplied).

Dr. Vincent reported that the petitioner had refused to cooperate for purposes of testing.

[By Mr. Salomon:]
Q. All right, so, what does this indicate to us?

A. Again, the size is very small, I wasn't getting tremendous cooperation at that point. As you can see, it's a stick figure as opposed to the normal drawing of a person with arms and body and so forth. (R., p. 0612, emphasis supplied).



Perry also refused to assist Dr. Vincent with other testing. (R., p. 0630). This evidence, buttressed with the fact that Perry has refused medication, clearly supports a finding that the petitioner has refused to assist in his defense. The State respectfully submits that any other finding demeans the criminal justice system. As stated, supra, art. 641's second element of requiring a defendant to assist in his defense presumes that this incapacity is beyond the defendant's own control. Here the petitioner can control his capacity to assist in his defense by regularly taking his medication. Allowing the petitioner to withdraw medication and thereby, become incapable of assisting counsel allows the petitioner to manipulate the criminal justice system.

In the Gray case, supra, the State at page 49 went into the mental condition of Jimmy Lee Gray in great detail. Gray's mental illness was far more severe than the petitioner's, and yet, he was declared competent for execution under Mississippi law. Most importantly, Mississippi's standard of competency for execution includes assisting in one's defense. Mississippi required that the condemned inmate possess "the intelligence requisite to convey such information to his attorneys or the court" as necessary in assisting in his defense. Gray, 710 F.2d at 1054. Using this standard the Fifth Circuit rejected Gray's claims he had become insane subsequent to conviction. The State respectfully submits that Perry, as well, has the ability to assist in his defense, proven by the expert testimony and his own words and actions.

Twelve jurors found Michael Owen Perry guilty beyond a reasonable doubt of viciously and mercilessly killing his mother, father, two teen-age cousins and an infant nephew in their homes. They unanimously sentenced him to death after finding two aggravating circumstances. Seven justices of this Honorable Court unanimously affirmed the conviction and sentence on appeal. Yet the petitioner, if allowed, will turn the whole system into a farce. Simply put, if he stops the medication, he stays his execution. His inducement of insanity becomes his loophole to execution.

The State respectfully requests this Honorable Court to allow justice be done, and affirm the trial court's ruling that Michael Owen Perry is PRESENTLY competent for execution.

## IX. THE TRIAL COURT'S JUDGMENT THAT PETITIONER IS COMPETENT TO PROCEED TO EXECUTION WAS A CORRECT AND VALID DETERMINATION OF PETITIONER'S PRESENT COMPETENCE.

As previously set forth in detail, the evidence conclusively points to the fact that Michael Owen Perry is competent to proceed to execution. It was upon this evidence that the trial court found it "obvious" that the petitioner was competent to proceed to execution, concluding that:

> "The defendant, Michael Owen Perry, is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason he is to suffer said punishment." (R. at 0005).

The trial court also determined that this level of competence sufficient to proceed to execution was maintained through treatment. In accord with this finding the trial court further concluded that:

> "Defendant's competency is achieved through the use of antitropic or antipsychotic drugs, including Haldol, and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication, as to be prescribed by the medical staff of said Department and if necessary, to administer said medication forcibly to defendant and over his objection." (R. at 0005).

This judgment, and subsequent orders of the trial court, is best characterized as a dual holding. The first holding concludes that Michael Owen Perry is presently competent to proceed to execution. The second holding orders Perry to receive continuing treatment so that his present competence shall be maintained. This second holding of the trial court implicitly expresses its belief that Perry is incompetent without treatment. In other words, the trial court's order that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment.

The first prong of the court's decision, holding Michael Owen Perry competent to proceed to execution, is correct because, in rendering a decision on an individual's competence to proceed to execution, the trier of fact must look only to the individual's present condition. It is clear under Louisiana law that a determination of competence is to be made as to the individual's present condition only, regardless of how that condition is maintained.



A. The trial court properly focused on the petitioner's present competence.

As reflected in the record, the trial court concluded that Perry is competent for purposes of execution because of his awareness of the punishment he is to suffer and the reason he is to suffer said punishment. The court based its determination of present competence on the written evidence and oral testimony of the witnesses. Petitioner contends that the court erred in this determination, however, because it based its order on petitioner's medicated condition." In other words, Perry alleges the court erred in concluding that he is competent to proceed because his condition of competence, as presented to the court for determination, was based solely on medication. The error in this belief is clearly shown in Hampton, supra, which requires that in determining questions of competence, a court look to the individual's present condition only.

In Hampton, the Louisiana Supreme Court was faced with the question of whether a defendant, whose mental capability was maintained only through the use of prescribed medication, was competent to stand trial. The evidence in Hampton overwhelmingly stressed that the defendant's competence to proceed was based solely on the continued administration of medication, including testimony from a member of the sanity commission that "[a]t the present time, she's (the defendant) legally sane, and she is legally sane due to medication." Hampton, at 312. The trial court in Hampton found the defendant "synthetically sane," yet determined that capacity induced by medication was insufficient to proceed to trial.

In rejecting the trial court's determination, the Supreme Court mandated that in assessing an individual's competence to proceed, the trier of fact look only to that individual's competence as it presently exists:

> "That this condition (competence to proceed) has resulted from the use of a prescribed tranquilizing medication is of no legal consequence. Under the codal test, the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science." Hampton, at 312.

Hampton requires that the trier of fact look only to an individual's competence as presented for determination, not to how this competence is achieved or maintained.

The requirement that a court look only to an individual's present condition in determining competence was reaffirmed in State v. Collins, 381 So.2d 449 (La. 1980). In Collins , the defendant was found not guilty of attempted armed robbery by reason of insanity, and was remanded to the East Louisiana State Hospital. Seven months later, the defendant claimed his mental illness was in remission, and petitioned the court for a hearing on the question of his release.

As in Hampton, the evidence overwhelmingly stressed the importance of treatment in maintaining defendant's competence. The evidence showed:

> "[i]f the (defendant) followed the medical regimen recommended by his psychiatrists (including daily medication) he would not pose a danger either to himself or to society if he were released ... if the (defendant) stopped taking his medication he would probably suffer a relapse and in those circumstances he could pose a danger to himself and others." Collins, at 450.

In light of this evidence, the trial court denied defendant's release, claiming a reluctance to release "an unstable individual who has the propensity to remit." Collins, at 450.

In vacating the trial court's ruling, this Court cited Hampton in saying, "the fact that the remission (of the illness) had occurred because of the administration of medication was of no legal significance." Collins, at 451. The court went on to state that:

> "[w]e cannot ignore the fact that the relator at present poses no danger to society or to himself merely because the improvement in his condition was caused by the very treatment which he was sent to East Louisiana State Hospital to receive. To do so would be to disregard the fact that the assiduous application of the knowledge of medical science can indeed transform patients into contributing members of society." Collins, at 451.

The court then authorized the release of the defendant based upon his medically maintained level of competence.

The holdings of Hampton and Collins were applied by the First Circuit in State v. Boulmay, 498 So.2d 213 (La. App. 1st Cir. 1986). In Boulmay, the defendant, who had been found



not guilty by reason of insanity of armed robbery and two counts of attempted murder, petitioned for a hearing to determine whether he could be released on probation. The appellate court was confronted with a record replete with evidence that the defendant presently posed no danger to society or to himself, and that this condition was achieved by the treatment he had received. Faced with this evidence, the appellate court found that the trial court erred in "refusing to accept that 'chemical sanity' may be a legitimate consideration in favor of probation." Boulmay, at 215. The court went on to hold the fact that the defendant was only "chemically sane" did not preclude his release from the detaining facility.

Inmate Perry now stands before this Honorable Court alleging error in the trial court's adherence to the principle, iterated in the above succession of jurisprudence, that a determination of competence is to be based on an individual's present condition only. Perry would have this court believe it necessary to reverse this line of cases and overturn the trial court's determination of competence to proceed to execution because his condition was based on medication.

This is an unreasonable request, for it simply ignores the foundation upon which these decisions rest. Competence in an unmedicated state is no different than competence in a medicated state. The condition itself is the same in each; that is, whether petitioner's competence is or is not based on medication, the fact remains that Michael Owen Perry is aware of the punishment he is to suffer and why he is to suffer said punishment.

As the courts have acknowledged, it is ridiculous to fail to recognize competence maintained through treatment simply because it is maintained through treatment. To do so would disregard that fact that medical science can treat a condition so that an individual is able to function as any other. Should Michael Owen Perry be allowed to forestall his execution simply because his awareness is maintained through treatment, while another death row inmate possessing the same mental awareness, absent treatment, would be forced to proceed to death?

This court has recognized in Hampton and its progeny that this loophole to a valid sentence cannot exist. It would

be folly to believe that Perry would take this same stance in opposition to Hampton if the question concerned his competence to be released on probation or parole.

Hampton and progeny undoubtedly hold that a determination of competence to proceed to execution must be based on the individual's present condition. It is irrelevant to the determination whether the individual's competence is or is not maintained through medication.

Accordingly, the State asserts that the trial court's judgment concluding that Michael Owen Perry was competent to proceed for the purpose of execution was a valid determination of petitioner's present competence.



X. THE TRIAL COURT'S JUDGMENT ORDERING THE MEDICAL STAFF OF THE DEPARTMENT OF CORRECTIONS TO CONTINUE PETITIONER ON TREATMENT SO AS TO MAINTAIN HIS COMPETENCE TO PROCEED TO EXECUTION IS VALID.

As previously set forth, the trial court first concluded that Michael Owen Perry is competent to proceed to execution in that he is aware of the punishment he is to suffer and the reason he is to suffer said punishment. In addition to this initial holding, the trial court also determined that this level of competence was achieved and maintained through the use of treatment; in other words, without treatment, Michael Owen Perry is incompetent to proceed to execution. The trial court therefore ordered the medical staff of the Department of Corrections to continue the petitioner's treatment, in the exercise of the Department's pyhsician's professional judgment, to maintain Perry's competence.

The reasons supporting the validity of the first prong of the trial court's [illegible] were detailed in Arguments I through VIII, supra. It is clear under our law that a determination of competence to proceed must be based on an individual's present condition only. It is also clear that it is irrelevant to this initial determination of competence whether treatment will be necessary to maintain the individual's competence. See Collins, supra. What is necessary is that the individual's condition, as presented to the court for determination, be of a level of competence sufficient to fulfill the applicable standard.

The second prong of the trial court's holding ordering treatment of Michael Owen Perry is valid for three reasons. The first is that in all provisions of Louisiana law dealing with judicial determinations of competence, ranging from pre-trial determinations to judicial commitments, the individual submits himself to treatment upon a determination of the necessity of treatment (i.e., a determination of incompetency). The raising and questioning of competence (or incompetence) acts as an implicit submission on the part of the individual to treatment when the court determines treatment is necessary to achieve and maintain competence (i.e., that the individual is incompetent without treatment).

The second reason is the duty and inherent power vested in the trial court by the Louisiana Constitution and

Code of Criminal Procedure. Each of these bodies of law grants to courts certain inherent powers and duties regarding their effective operation and administration of justice. To accept petitioner's position is to ignore a court's inherent power to effectuate and enforce its valid judgments. The trial court must necessarily possess the inherent power to order treatment when deemed necessary to maintain competence in a proceeding where a death row inmate asserts incompetence as a bar to his execution.

The third reason is that the trial court's order comports with both federal and state constitutional requirements. The order is not violative of any constitutional provision; in fact, the order fulfills the State's constitutional obligation to provide medical assistance to those individuals lawfully in its custody.

A. The trial court's order requiring treatment is valid because Perry implicitly submitted to treatment upon asserting and proving he is incompetent (or competent only while treated).

Michael Owen Perry presented voluminous evidence to the trial court in an attempt to prove his incompetence to proceed to execution. Having had the trial court determine him competent to proceed to execution only while maintained on treatment (conversely, incompetent if not maintained on treatment), Perry now asserts that the issue of his competence to proceed is a distinct issue from that of treatment. The State contends that this assertion is incorrect. Once the question of an individual's competence is raised, whether he be a civil committee, an accused, or a convicted felon, the necessity of treatment is a concomitant issue which must be addressed by the reviewing court.

The State's argument is bolstered by the pervasive scheme set forth in Louisiana law concerning treatment in competency determination proceedings. A review of our State's legislative schemes dealing with competency determinations clearly shows that whenever a court is presented with the question of an individual's competence, treatment is required when a determination of incompetence is made (i.e. competence only when treated). This principle applies to all individuals in all competency proceedings, whether they be judicial committees, pre-trial detainees, inmates, insanity acquittees, probatioers, or parolees.



The review of the statutory schemes dealing with determinations of competence and the necessity for treatment begins with the law dealing with commitments in civil situations. Under Louisiana law, a court is required in civil situations to order an individual committed and treated, whether by emergency certificate or by judicial commitment, when it is determined that the individual is incompetent or in need of treatment to maintain competence. That is, the issue of treatment is subsumed within a finding of incompetence. There is no requirement that the court which concluded incompetency must then conduct an additional inquiry to determine the need for treatment. Simply put, the finding of incompetency is a finding that treatment is necessary, and therefore authorized.

La. R.S. 28:53, dealing with admissions by emergency certificates provides in part:

> "K. Patients admitted by emergency certificate may receive medication and treatment without their consent, but no major surgical procedure, or electroshock therapy may be performed without the written consent of a court of competent jurisdiction after a hearing." (Emphasis supplied).

La. R.S. 28:55, dealing with judicial commitments, provides in part:

> "I. A patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent, but no major surgical procedures or electroshock therapy may be performed without the written authority of a court of competent jurisdiction after a hearing." (Emphasis supplied).

R.S. 28:53 provides for the medication and treatment of individuals without their consent as a corollary to their having been admitted by emergency certificate. The statute provides no procedure for a separate judicial determination of the necessity or power to order medication or treatment. Subsumed within the emergency certificate is the necessary submission by the individual to receive whatever treatment or medication is deemed necessary to achieve or maintain competence.

This same principle is true of R.S. 28:55, which provides for the medication and treatment of individuals without their consent as a corollary to their having been

judicially committed. Upon determination by the court that a person is subject to commitment, the treatment facility is necessarily and automatically given the power to treat and medicate the individual, even without his consent. Again, the statute does not provide a separate mechanism to the individual to question treatment; the question of treatment is necessarily subsumed within the court's power to order commitment.

The statutes provide that upon commitment, a person can be required by the court to receive treatment, even without consent, provided a hearing is held and treatment is deemed necessary (i.e., a conclusion of incompetence). It is noteworthy that these persons are not charged with a crime, much less convicted of the murders of five persons and sentenced to die in the electric chair. Yet our law provides that these persons may be required to undergo treatment, without their consent, upon a concurrent determination that treatment is necessary to achieve or to maintain competence.

In situations involving pre-trial or pre-conviction detainees where the question of competence to proceed is raised, the question of treatment is again subsumed within the court's power to determine competence.

La. C.Cr.P. art. 648, dealing with the procedures for treatment after a determination of mental capacity or incapacity, provides in part:

> "A. The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant ... for custody, care, and treatment, as long as the lack of capacity continues." (Emphasis supplied).

As in the civil proceedings, treatment must be administered upon a determination of incapacity. The only predicate for this order is that a determination of incompetence be made by the court. Once it is determined that treatment is necessary to achieve or maintain the individual's competence, the court necessarily has the power to order treatment of the individual, if not the duty.

Again, it is important to note that the court can order treatment of these individuals detained pre-trial even



though at the time they are shrouded in the veil of innocence. Nevertheless, treatment of pre-trial detainees is concurrent with the court's determination of the individual's incapacity to proceed. If determined to be necessary to achieve or maintain competence, treatment of a pre-trial detainee without his consent is required.

When a criminal defendant receives a verdict of not guilty by reason of insanity, the court must order the individual committed for custody, care and treatment.

La. C.Cr.P. art. 654, dealing with commitments of persons acquitted on grounds of insanity, provides in part:

> "When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant ... for custody, care and treatment.
>
> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall ... promptly hold a contradictory hearing ... If the court determines that the defendant cannot be released without danger to others or himself, it shall order him committed ... for custody, care and treatment." (Emphasis supplied).

La. C.Cr.P. art. 657, dealing with the discharge or release of insanity acquittees, provides in part:

> "After the hearing ... the court may order the committed person discharged, released on probation subject to specified conditions for a fixed and determinate period, or recommended to the state mental institution." (Emphasis supplied).

Under these provisions, a defendant in a capital case, found not guilty by reason of insanity, can be forced to receive treatment simply based upon the judgment that he was insane at the time of the commission of the offense. The court can also require a defendant in a non-capital case, found not guilty by reason of insanity, to receive treatment if it finds after a contradictory hearing that the defendant cannot be released without danger to others or to himself.

It is clear that the question of treatment of a defendant found not guilty by reason of insanity is contained within a decision on an individual's competence. The court can order treatment of these defendants, without their consent, upon a finding that treatment is necessary to achieve or maintain the individual's competence.

La. R.S. 15:574.4 provides that parolees may be required to conform to certain conditions. Among those conditions specifically listed in sub-section H is:

> "H.(11) Submit himself to available medical or psychiatric examination or treatment or both when ordered to do so by the probation and parole officer."

Submission to treatment is inherent within the parole officer's determination of its necessity. If a parole officer can require a parolee to submit to treatment upon questioning his competence, cannot a death row inmate be required to submit to treatment having voluntarily chosen to provoke inquiry into and a ruling upon his competence?

Finally, the court has the power to order prisoners confined in penal institutions to receive medication subsequent to a predicate determination, pursuant to a hearing, that the treatment is necessary to prevent harm or injury to the inmate or others.

La. R.S. 15:830.1 provides in part:

> "A. Whenever a mentally ill or mentally retarded inmate refuses treatment ... the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided."

Under this statute, the court can order treatment of an inmate, without his consent, simply upon a finding that treatment is necessary to prevent harm or injury to the inmate or others.

The principle pervasive throughout this legislation is that the determination regarding the necessity of treatment is subsumed within the determination of competency. Whether the question of competence is raised by the court, the State, the individual, or a third party in any of the above situations, Louisiana law clearly incorporates treatment within a proceeding determining competence. The questioning of competence necessarily acts as an implicit submission by the individual to treatment when it is deemed necessary. Some of the above situations are where the individuals have not acted to provoke inquiry into competency. In regard to Perry, he has provoked inquiry into his competency. It should therefore be clear that he has taken a voluntary act which submits himself



to the power of the law and the court. Yet petitioner stands before this Honorable Court claiming that any question of treatment is separate from a determination of his competence; therefore, it was outside the scope of the trial court's power to order treatment concurrent with its determination of incompetency (i.e., that treatment was necessary). To accept this premise, however, is to ignore the scheme set forth by the previously cited legislation.

As repeatedly stated, the questioning of an individual's competence, in all of the settings discussed, acts as an implicit submission on that individual's part to the treatment, if it is necessary to achieve or maintain competence. The State acknowledges that the legislature has not expressly applied this principle to a death row inmate who asserts incompetence to proceed to execution. Yet the express application of this "implicit submission" principle in the legislation dealing with all competency determinations provided for by law impliedly recognizes its application to the unprovided for area of competency determinations regarding death row inmates.

While true that the death penalty is a "special situation," its nature as a "special situation" gives even greater credence to the State's assertion that a claim of incompetence to proceed to execution is an implicit submission to treatment, if it is deemed necessary to maintain or achieve competence. Is a death row inmate afforded a loophole to execution by proving incompetence to proceed, thereby thwarting the imposition of a lawful sentence because the question of treatment is separate from that of competence? Should a death row inmate be allowed to stay his sentence and at the same time prohibit treatment which, in the opinion of experts, maintains his competence to proceed and is the recommended form of treatment for his particular illness? The State asserts that Louisiana law does not provide for this type of manipulation of the criminal justice system. The law implicitly requires that a death row inmate asserting incompetence submit to treatment if it is necessary to maintain his competence.

B. <u>The trial court's order requiring treatment of Michael Owen Perry is valid since it is within the Court's inherent power and duty</u>.

The trial court's order of treatment to maintain Michael Owen Perry's competence to proceed to execution is

valid since it is within its inherent power and duty. The Louisiana Constitution of 1974 and the Code of Criminal Procedure endow courts with certain inherent powers, authorities and duties.

La. Const. Art. 5, §2 provides in part that:

> "A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court."

La. C.Cr.P. Art. 3 provides:

> "Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." (Emphasis supplied).

La. C.Cr.P. Art. 16 provides:

> "Courts have the jurisdiction and powers over criminal proceedings that are conferred upon them by the constitution and statutes of this State, except as their statutory jurisdiction and powers are restricted, enlarged, or modified by the provisions of this Code."

La. C.Cr.P. Art. 17 provides:

> "A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." (Emphasis supplied).

Each of these constitutional and codal provisions recognizes the necessary and inherent powers the court must possess in order to control and adjudicate criminal proceedings. A closer look at each provision illuminates the court's inherent power to order a death row inmate to undergo treatment so that his competence to proceed to execution can be maintained.

La. Const. art. 5, §2 empowers the court to issue all needful orders in aid of its jurisdiction. It is important to note that La. R.S. 15:567 imposes a mandatory, continuing duty on the court of original jurisdiction to issue a warrant of execution subsequent to the dissolution or termination of any stay, reprieve or other intermittent proceeding.



Pursuant to this continuing jurisdiction, and its jurisdiction vested through the competency determination, art. 5, §2, vested the trial court with the power to issue needful orders in aid of its jurisdiction. Having determined petitioner's competence is achieved and maintained through the use of treatment, the trial court ordered treatment so that competence sufficient to proceed to execution could be maintained. The power to issue orders in aid of its jurisdiction allowed the trial court to order treatment for the petitioner so that the court could fulfill its obligation, as court of original jurisdiction, to issue a warrant of execution.

La. C.Cr.P. art. 3 provides the court, in the absence of a specific procedure, the power to fashion a procedure consistent with the spirit of the Constitution, the Criminal Code, and other legislation. This power was recognized in State v. Eros Cinema, Inc., 264 So.2d 615 (La. 1972) as the power to make "specific pronouncements" under the court's "general authority for establishing procedural guidelines in the absence of specific legislative procedural rules." Eros, at 620. As previously acknowledged, the legislature has not expressly provided specific provisions regarding determinations of competence and determinations of treatment for death row inmates. Since no provision exists, the court is empowered to formulate its own procedure for ordering a death row inmate to receive treatment, as long as the procedure is consistent with the State's Constitution, Criminal Code and other statutory laws.

The State asserts that the trial court's ordering treatment of Michael Owen Perry was within its power under Article 3 to establish a procedure for determining the necessity of treatment for a death row inmate who is asserting incompetence to proceed. As exhaustively set forth, the legislature has enacted numerous procedures for determining competence in a wide range of settings. In each of these settings, whether it be in a civil setting, a pre-trial detainee, an inmate, an insanity acquittee, or as a condition of probation for parolees, the power to order treatment is concomitant to the trial court's determination that treatment is necessary.

Whether treatment is mandated because the individual is gravely disabled, is a danger to himself or others, is incapable of proceeding to trial or because treatment is

required as a condition of probation, it is clear that the power to order treatment is incorporated within the determination of competence. The trial court's ordering treatment is clearly consistent with this procedure. The trial court first was presented with the question of petitioner's competence to proceed to execution. The court found petitioner competent, but found this competence was maintained only by treatment. The court, therefore, ordered petitioner treated in the future so that his competence could be maintained.

The procedure is exactly in line with the procedures provided by the legislative enactments dealing with competency determinations in any setting. The trial court is first presented with the question of the individual's competence. Upon determining that treatment is necessary to achieve or maintain a sufficient level of competence, by whatever standard is applicable in that situation, the trial court necessarily has the power to order treatment, even without the individual's consent.

The State asserts that the trial court acted within the powers bestowed on it through La. C.Cr.P. art. 3, by creating a procedure whereby a death row inmate can be ordered to receive treatment, even without his consent, so that his competence to proceed to execution can be maintained. The order of treatment was valid under art. 3 because it is consistent with all Louisiana legislation dealing with determinations of competence and the necessity of treatment. That is, an individual's assertion of incompetence before a court submits the individual to the court's power to order treatment if it is necessary to achieve or maintain competence.

La. C.Cr.P. art. 16 vests courts with the jurisdiction and powers over criminal proceedings that are conferred on them by law, except as these powers are restricted by provisions of the Code of Criminal Procedure. The law clearly conferred on the court the power to render a determination on petitioner's competence to proceed to execution. Yet the law also conferred on the court the power to order treatment if necessary because of its power to determine the antecedent question of petitioner's competence.

This power, if not an express legislative pronouncement, is at least implicit because of Louisiana's scheme for treating individuals pursuant to competency determinations. Louisiana



law clearly empowers courts to order treatment of individuals simply because of the nature of the proceeding. It would be incongruous to suggest that the law would grant a court the power to render a judgment on an individual's competence and determine that treatment is necessary, yet render that court powerless to order treatment. The State therefore asserts that art. 16 further buttresses the validity of the trial court's order of treatment because Louisiana law implicitly conferred on the court the power to order treatment of petitioner so that his competence to proceed to execution could be maintained.

The final express recognition of the trial court's inherent power to order treatment of a death row inmate in order to maintain his competence to proceed to execution is found in La.C.Cr.P. art. 17. Art. 17 recognizes that courts inherently possess all powers necessary for the exercise of their jurisdiction and the enforcement of their lawful orders, including the power to issue orders necessary in aid of its jurisdiction. Art. 17 further recognizes the duty of the trial court to control criminal proceedings so that justice is done.

This inherent power of courts to carry out lawful orders was recognized by this Honorable Court in State v. Mims, 329 So.2d 686 (La. 1976), in which the Court stated:

> "Where the law is silent, it is within the inherent authority of the court to fashion a remedy which will promote the orderly and expeditious administration of justice." Mims, at 688.

Art. 17 inherently vests in the trial court all powers necessary for the enforcement of its lawful orders. Michael Owen Perry was lawfully convicted of murdering five persons, and was lawfully sentenced to death. As previously stated, this court has a statutory duty to set an execution date. (See La. R.S. 15:567.) In order to fulfill the duty, the trial court ordered that petitioner's competence to proceed to execution be maintained through treatment.

To deny that the trial court possesses the power under art. 17 would frustrate the expeditious administration of justice by allowing petitioner to elude the court's enforcement of its validly imposed sentence of execution. To prevent this frustration of justice, art. 17 empowers the trial court to order treatment of Perry so that his competence to proceed to execution may be maintained.

The State asserts that to accept petitioner's proposition that a treatment determination is a wholly separate question from the question of competence is to ignore the court's inherent power to control criminal proceedings. To allege that the trial court had no power to order treatment is not only contrary to all legislation dealing with determinations of competence in other settings, it also disregards the express grants of power inherently endowed in all courts. The State contends that the trial court's order of treatment was valid, as within its inherent power and consistent with state law, so that Michael Owen Perry's competence to proceed to execution shall be maintained.

C. The determinations of competence and treatment are so "inextricably intertwined" that a determination of incompetence or competence maintained through treatment, necessarily subsumes the question of treatment.

This notion that petitioner implicitly submitted to the trial court's power to order treatment, by asserting his incompetence and having an impartial trier of fact determine the necessity of treatment, is also supported by a Federal court decision. Also see Washington v. Harper, 44 Cr. L. 4189, cert. granted March 6, 1989. The United States Court of Appeals for the Fourth Circuit recently dealt with the question of the connexity between a determination of incompetence to stand trial and the resulting necessity for treatment.

On rehearing in United States v. Charters, 863 F.2d 302, (4th Cir. 1988),(judgment stayed pending disposition of the petition for writ of certiorari) 44 Cr. L. 4178 (by Brennan, J., Feb., 14, 1989), the court was presented with the government's attempt to administer antipsychotic medication to an individual, without his consent, who had been judged incompetent to stand trial and ordered confined. On original hearing, a three member panel of the court held that the questions were distinctly and wholly separate. After initial determination of incompetence, the Court stated that when an inmate later manifested an objection to medication, a second, elaborate judicial proceeding was required.

This proceeding consisted of a two stage process. The process was described by the Charters court on rehearing as follows:



> "In the first stage, an adversarial factfinding process would be used by the court to determine whether the inmate was mentally competent to make a rational decision respecting his own best interests -- whether to accept the medication or not. If found competent in this respect, his objection must be honored. If found incompetent, the court would then make a 'substituted' judicial judgment of the inmate's 'best interests.'" Charters, at 307.

This process required a separate judicial determination of the individual's competence to make a decision regarding treatment apart from the initial judicial determination of the individual's competence. Within this second determination, the court was to determine if the individual was competent to make a rational decision in his own best interests regarding the refusal of treatment. If it was determined that he could, the inquiry was to stop at that point. If it was determined the individual was not competent to make a rational decision regarding treatment, the court was required to make a "substituted" judicial determination of the inmate's best interest regarding treatment.

On rehearing, an en banc panel of the Fourth Circuit completely rejected this approach. In so doing, the court recognized that the very nature of each determination rendered them inextricably intertwined. This excerpt from Charters, though lengthy, will clarify this relationship between the questions:

> "By requiring a preliminary factual determination of the inmate's mental competence to decide his own best interests in receiving or declining medication, this regime would pose an unavoidable risk of completely anomalous, perhaps flatly inconsistent, determinations of mental competence by different judicial tribunals. It must be recalled that Charters (as would be all similarly situated inmates), has already been properly adjudged 'so mentally incompetent as to be unable to understand the [criminal] proceeding against him or properly assist in his own defense' under former 18 U.S.C. §4244. That solemn judicial adjudication still stands. The proposed regime contemplates that without altering that extant determination of incompetence to assist in his defense he might now be judicially determined nevertheless competent to determine his own best interests in receiving or refusing medication. While in theory there may be a difference between the two mental states, it must certainly be one of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals. To suppose that it is a distinction that can be fairly discerned and applied by even the most skilled judges on the basis of an adversarial fact-finding proceeding

> taxes credibility. The resulting threat of wholly inconsistent or highly anamalous adjudications is palpable, and poses high risks to the integrity and trustworthiness of the court's already perilous involvement --out of necessity -- in the adjudication of complex states of mental pathology." Charters, at 310.

As recognized by the court, the question of treatment is by nature incorporated into the question of competence. To suggest a distinction exists would, in the court's words, tax credibility. It is the nature of these questions that guided the court in Charters to hold that once a determination of incompetence was made, it would be left to the judgment of the treating physician whether medication was necessary. This judgment by the medical personnel need not be presented before a court to determine whether the individual could be treated without his consent. The determination regarding treatment is automatically placed with the medical experts simply upon a finding of incompetence and a determination by the doctors that treatment was necessary.

The State asserts that the reason which guided the Charters court on rehearing is that which guided Trial Judge Hymel in ordering treatment for Perry in order to maintain his competence. As recognized in Charters, the trial court was necessarily confronted with the question of treatment when it determined that Perry was incompetent without treatment. Since the questions of competence and treatment are necessarily intertwined, the court was required to order treatment when it determined treatment was necessary to maintain Michael Owen Perry's competence to proceed to execution.

D. Submission to the trial court's power to render a determination on a death row inmate's competence to proceed to execution acts as an "implied waiver" to any objection the inmate may have to treatment.

By their very nature, the processes and procedures for determining competence are different than those involved in a full blown criminal trial, including the necessary waiver of certain constitutional rights. In Buchanan v. Kentucky, _____ U.S. _____, 107 S.Ct. 2906, _____ L.Ed.2d _____ (1987), the United States Supreme Court held that the state's use of a psychiatric report used solely to rebut the defendant's "mental status" defense did not violate the defendant's Fifth or Sixth



Amendment rights. The court found that the use of testimony from a psychiatric examination did not violate the defendant's right against self-incrimination when used to rebut the defendant's assertions and proof of incompetence. The court also found no violation of the defendant's Sixth Amendment right to counsel when counsel actively participated in the entirety of the proceeding.

These principles were examined by the Fifth Circuit Court of Appeal in Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988). In Schneider, the court described the principles approved in Buchanan as follows:

> "We have described the principle approved in Buchanan - a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind -- as involving a 'waiver' of Fifth Amendment rights ... Whatever the label, the principle reflects the courts' attempts to maintain a 'fair state-individual balance,' a value underlying the Fifth Amendment privilege itself." Schneider, at 576. (Emphasis supplied).

The court went on to support its view that the assertion of incompetence acted as a waiver of the Fifth Amendment's privilege against self incrimination by saying:

> "It is unfair and improper to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. The principle also rests on 'the need to prevent fraudulent mental defenses.'" Schneider, at 576.

The court in Schneider also spoke in similar terms of a "waiver" regarding the defendant's Sixth Amendment's right to counsel. Initially, the court stated that:

> "Given our rejection of Schneider's Fifth Amendment claim, however, his Sixth Amendment objection may not succeed either. In Williams v. Lynaugh, 809 F.2d 1063 (5th Cir. 1987) we treated both Fifth and Sixth Amendment objections as waived when the prosecution's psychiatric evidence was properly limited to rebuttal of defendant's mental - status evidence." Schneider, at 578. (Emphasis supplied).

The court went on to reject the defendant's objections in stating:

> "Schneider cannot complain of the mere fact that the examination extended beyond the subject of competency. He can only object to the use of

> that broadened examination against him; and he is held, as a matter of policy if not of 'knowing and intelligent' waiver to have invited that use by introducing mental-status testimony of his own. If maintenance of a 'fair state-individual balance' requires this conclusion under the Fifth Amendment, Schneider may not circumvent this policy through the Sixth Amendment." Schneider, at 578.

Each of these cases stands for the same proposition: an assertion of incompetence, and subsequent adjudication of that issue, necessarily results in the foregoing of the privilege against self incrimination and aspects of the right to counsel. This foregoing of certain rights applies to an individual's submission to the court's power to order treatment upon an assertion of incompetence and resulting determination of the necessity of treatment (i.e., incompetence without treatment). Whether characterized as a logical recognition, as in Buchanan, that an assertion of incompetence mandates the relinquishment of certain rights, or as a waiver of rights, as characterized by Schneider, the premise is the same. An assertion of incompetence requires the submission of the individual to the court's power to adjudicate a true determination of competence, including the submission of Fifth and Sixth Amendment rights or privileges. Nowhere is this more true than in the submission of the individual to the court's power to order treatment upon an assertion of incompetence and a determination that treatment is necessary to achieve and maintain competence. Just as a defendant cannot assert a privilege against self incrimination or a right to counsel to thwart a true determination of competence by the trier of fact, that same individual cannot deny the court's power to order treatment if it is determined necessary to achieve and maintain competence.

Is a death row inmate to have the power to emasculate the court by negating its power to carry out a lawful sentence of execution by refusing treatment even though he has asserted incompetence, presented evidence in support thereof, and had a judicial determination rendered ordering that treatment is necessary to achieve and maintain the inmate's competence? The State asserts that the pervasive scheme in Louisiana law dealing with treatment and competence determinations as concomitant issues says no. The State asserts that the inherent power of the court says no. The State asserts that Charters, Buchanan, and Schneider say no. What each of these bodies of law does require is that an assertion of incompetence



to proceed to execution requires an implicit submission by that inmate to the trial court's power to order treatment, if it is determined that treatment is necessary to achieve and maintain the inmate's competence to proceed.

E. Competence maintained through the use of treatment is valid competence for the purpose of proceeding to execution.

The trial court determined that Michael Owen Perry is competent to proceed to execution in that he is aware of the punishment he is about to suffer and why he is to suffer said punishment. The court also determined that this level of competence was maintained through the use of medication; therefore, it ordered petitioner to undergo treatment. This treatment is to ensure that Michael Owen Perry's competence be maintained at a sufficient level so that his sentence may be carried out. The State unequivocally asserts that competence maintained through the use of treatment is valid so as to allow petitioner's execution to occur.

The Louisiana Supreme Court has recognized the validity of competence maintained and achieved by treatment in both pre-trial and post-trial settings. In the pre-trial context, the Supreme Court has determined that medically induced and maintained competence is sufficient competence so that a criminal defendant may be brought to trial.

In Hampton, the Louisiana Supreme Court held that "a defendant whose mental capability was maintained only through the use of a prescribed medication was competent to stand trial." Hampton, at 311. The Court went on to hold that the "likelihood that defendant would relapse if use of medication was interrupted did not bar defendant from proceeding to trial." Hampton, at 311. The underlying reason for this holding, as previously discussed, is that in determining competence:

> "...the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science." Hampton, at 312.

In State v. Lawrence, 368 So.2d 699 (La. 1979), a case involving a defendant accused of second degree murder, the court was faced with the question of whether a defendant, whose

competence was maintained only through the use of medication, was sufficiently competent to be brought to trial. In approving of the validity in proceeding to trial based on medically maintained competence, the court stated that a defendant can be "required to stand trial even if his mental capacity is maintained only through the use of prescribed drugs." Lawrence, at 702.

In each of these pre-trial settings, the court validated an individual's proceeding to trial based on competence maintained through the use of treatment. Each of these individuals was presumed innocent until proven guilty; yet the court refused to grant either defendant a loophole from proceeding to trial because their competence was maintained only through the use of treatment. Should petitioner, whose competence to proceed is maintained by treatment, be granted a loophole to execution, having been tried and convicted for murdering five persons, while an individual who is presumed innocent be required to proceed to trial when his competence is maintained in the same fashion? The State asserts that the answer to this question, under Hampton and Lawrence, is that competence maintained through treatment is valid competence so that a death row inmate can proceed to execution.

In a post-conviction setting, the Supreme Court has validated competence maintained or achieved through treatment as the basis for releasing a defendant who was incarcerated after being found not guilty by reason of insanity. In Collins, the court stated that a defendant found not guilty by reason of insanity could be released pursuant to La. C.Cr.P. art. 657, even though his competence was achieved only through the administration of medication. The court stated that his competence could not be deemed invalid, "merely because the improvement in his condition was caused by the very treatment which he was sent ...to receive." Collins, at 451.

The First Circuit reaffirmed the Supreme Court's approval of medically maintained competence in Boulmay. In Boulmay, the defendant, who was held after being found not guilty by reason of insanity, sought to be released pursuant to La. C.Cr.P. art. 657. The court held that the fact that the defendant's competence was only maintained through treatment did not preclude his release from incarceration. In so holding, the court, citing Hampton, stated that, "to look beyond the defendant's condition and find him incompetent



because that condition was chemical (sic) induced would be to erase improvement produced by medical science." Boulmay, at 214-215. The court went on to say that, "remission occurring because of the administration of medication was of no legal significance." Boulmay, at 215.

In Collins and Boulmay, the courts seized the opportunity to iterate that if competence maintained through medication is sufficient to go to trial, it is sufficient to be released into society. In Perry's case, the trial court continued this logical extension by ordering that competence maintained through treatment is also competence sufficient for a death row inmate to proceed to execution.

The State contends that the trial court was correct in following this line of jurisprudence. The State asserts that a death row inmate can be executed even though his competence is maintained only through the use of treatment. If a pre-trial defendant, who is afforded heightened constitutional protections, can be brought to trial even though his competence is maintained by treatment, a convicted inmate can be required to fulfill his sentence of death even though his competence is maintained only through medication. This same analogy holds true in the case of defendants seeking release on probation or parole, those found not guilty by reason of insanity, and civil committees who seek release on medically maintained competence.

Petitioner's status as a death row inmate does not remove him from this sphere. Michael Owen Perry's competence, maintained through treatment, is valid so that he may proceed to execution.

This reasoning regarding the validity of competence maintained by treatment being valid competence so that a death row inmate is competent to proceed to execution is supported by Justice Powell in his concurring opinion in Ford. As Justice Powell states:

> "[T]he State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim (of incompetence to proceed to execution). Rather, the only question raised is not whether, but when, his execution may take place." Ford, at 2610.

Justice Powell further opines that if a death row inmate, determined to lack the mental faculties necessary to proceed to execution, is restored to competence sufficient to proceed to execution, the State is free to execute him. Such view is in accord with the Louisiana Supreme Court's view on competence achieved or maintained through treatment; therefore, if a death row inmate's competence is maintained through treatment, the State is free to carry out the inmate's lawful sentence of death.

Accordingly, the State asserts that Michael Owen Perry's competence to proceed to execution, that is maintained through the use of treatment is valid competence so that Perry's sentence of death may be carried out.

F. The trial court's order of treatment satisfies procedural due process protections because the question of treatment is subsumed within a competency determination.

To reiterate, the trial court empaneled a sanity commission to assist in the determination of Michael Owen Perry's competence to proceed to execution. After the presentation of all evidence by the experts, by the State, and by Perry, the court determined that Perry was presently competent to proceed to execution. The court further found that Perry's competence was achieved by treatment; that is, that Perry was incompetent without treatment. Therefore, the court ordered the Department of Corrections to continue Perry on treatment in order to maintain his competence.

Petitioner contends that the trial court's ordering treatment violated procedural due process in not affording him two separate hearings. Petitioner believes due process required an initial hearing on his competence. Upon a determination that he was incompetent (only competent while treated) Perry claims he was then entitled to a second hearing on the court's authority to order treatment as opposed to his competence to refuse treatment.

The State asserts that the court's ordering treatment upon determining Perry incompetent (i.e., competent only if treated) satisfied due process. The reason for this is because a proceeding determining competence necessarily subsumes a determination on the necessity of treatment. Once the requisite procedural protections were provided by the court in



addressing the question of Perry's competence to proceed (see arguments I-VIII; XI), Perry could be required to submit to treatment.

It is untenable to think a court, upon determining incompetence (or competence maintained through treatment) cannot order treatment, but must initiate a second separate proceeding to determine if it can treat the inmate. Neither state nor federal law require such an absurd result.

What is required by procedural due process in this context is that Perry submit to treatment upon a determination that he is incompetent (or competent while treated). Pursuant to the submission to treatment theory there is no need for a second hearing. The proposition of only hearing comports with due process. It is supported by: 1) policy considerations; 2) Louisiana law; 3) Federal jurisprudence; and 4) other States' law.

1) Policy Considerations

The policy underlying the requirements of procedural due process require that a determination of the process Perry was entitled to regarding the trial court's ordering treatment must be based on the nature of the decision being made. And what is the nature of the court's decision? First, that Perry is presently competent. Second, that Perry is competent only when treated; that is, incompetent if not treated. In light of these decisions, the court ordered treatment.

Petitioner contends due process required a second hearing on the question of treatment after having been found incompetent. To accept this position, however, simply ignores the nature of competency proceedings regarding determinations of incompetence and orders of treatment.

First, requiring separate hearings on each question impedes judicial economy and poses an unavoidable risk of completely inconsistent determinations of mental competence.

Second, the questions of incompetence and treatment are necessarily and inextricably intertwined. A distinction between competence to proceed to execution and competence to refuse treatment is certainly a fine line. To believe that a distinction could be drawn by the most skilled psychiatric professionals, much less a trial judge, would, quoting Charters, supra, "tax credibility."

Third, a death row inmate simply should not be afforded a loophole to executin by having a separate hearing on his ability to refuse treatment. Once determined incompetent (or competent while treated) the inmate has submitted himself to treatment. Justice certainly is not served by allowing a death row inmate the opportunity, in a second hearing, to refuse treatment that is beneficial to his mental health and maintains his competence to proceed to execution. It would certainly be an absurd result to allow a death row inmate, whose competence to proceed is maintained by treatment, to escape his sentence by refusing treatment, while an inmate with the same level of competence, yet not on medication, would be required to proceed to his death.

It must be remembered that the procedural requirements mandated by due process are not a rigid set of rules applied in the same fashion regarding every state action. As recognized by Justice Powell in his concurring opinion in Ford, "due process is a flexible concept, requiring only 'such procedural' protections as the particular situation demands." Ford, at 2610 citing Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, at 902, 47 l.Ed.2d 18 (1976).

A determination of the process required in a certain situation or proceeding is necessarily based upon the nature of such situation or proceeding. As recognized by the United States Supreme Court:

> "[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made" Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, at 2507, 61 L.Ed.2d 101 (1979).

The ultimate decision in a competency proceeding is determining whether the individual is competent or incompetent. Procedural due process is satisfied when upon a determination of incompetence (or competent if treated) the death row inmate submits to treatment.

2) Louisiana law

The scheme employed by the trial court in ordering Perry treated, pursuant to its determination that Perry was competent when treated, is the same process pervasive throughout Louisiana law regarding treatment of individuals pursuant to competency determinations. (See argument X, A.)



The procedural protection afforded a civilian, a pre-trial detainee, an inmate, or an individual on probatoin or parole is the same protection afforded Michael Owen Perry regarding treatment pursuant to a determination of incompetence. The question of treatment is resolved within an inquiry into competence before a judicial officer; that is, a single hearing is necessary to determine incompetence. Once determined incompetent, the individual must submit to treatment.

Once the court determines that the individual is incompetent (or competent while treated), the law requires that the individual submit to treatment. No provision exists in Louisiana law which separates competency determinations from questions of treatment.

Since Louisiana law subsumes a question of treatment within a competency proceeding, the trial court's ordering treatment of Perry upon determining him incompetent (or competent while treated) comports with due process. Michael Owen Perry was afforded far in excess of the procedural due process protection required in the proceeding determining his competence (see argument I-VIII, XI). Once the requisite procedural protections were provided by the trial court in addressing the question of his competence to proceed, Perry can have no due process objection to treatment that achieves and maintains his competence.

As recognized by the trial court and Louisiana law, a determination of incompetence and a question of the necessity of treatment are inextricably intertwined. It is ludicrous to suggest that a court, after providing procedural due process to an individual, can render a determination of incompetence (or competence maintained by treatment) yet have its "hands tied" by not being able to order treatment without first providing another hearing on that question.

3) Federal jurisprudence

The principle, espoused by the trial court and Louisiana law, that treatment of an individual is mandatory upon a determination of incompetence (or that treatment is necessary to maintain competence) was recognized by an en banc panel of the Fourth Circuit Court of Appeals in Charters, supra. As previously set forth, the court in Charters was

faced with the government's attempt to administer antipsychotic medication without the consent of an involuntarily committed psychiatric patient who had been found incompetent to stand trial and ordered confined.

The question presented in Charters was stated as follows:

> "What procedural protection is constitutionally required to protect the interest in freedom from bodily intrusion that is retained by an involuntarily committed individual after a prior due process proceeding that significantly curtails his basic liberty interest." Charters, at 306 (Emphasis supplied).

The court initially addressed this question by citing the inmate's only interest as being "afforded protection against arbitrary and capricious government action," of treating the individual with antipsychotic drugs. Charters, at 305.

The court went on to find that the individual's commitment, based on his incompetence, fully comported with due process. Having determined that the initial determination of incompetence comported with due process, the court rejected the scheme proposed by Charters regarding forcible treatment; that is, that a second adversarial hearing be held on the individual's competence to refuse treatment.

In rejecting this claim, the court stated that:

> "All factors considered, we are satisfied that the basic regime proposed by the government for making the medication decision in issue is adequate, if properly administered, to comply with due process requirements. We do not believe that adequate protection here requires, substitution of the pre-medication adjudicative regime proposed by Charters." Charters, at 312.

The government scheme adopted in Charters for treating individuals who are incompetent, or competent only if treated, is nearly identical to the scheme utilized by the trial court and all other Louisiana legislation dealing with competency determinations. Charters required that upon a determination, at a proceeding comporting with procedural due process requirements, that an individual is incompetent (or requires treatment to maintain his competence) the individual can be treated without his consent. This is the scheme that the trial court followed in ordering treatment for Michael Owen Perry.

Upon determining Perry competent only if maintained on



treatment, at a hearing which clearly comported with procedural due process, the trial court ordered Perry treated, even without his consent. No second hearing was necessary; no elaborate scheme was required to determine Perry's "competence" to refuse treatment. Due process was satisfied in ordering treatment when the trial court made a determination, at the conclusion of the hearing, that Michael Owen Perry's competence was maintained by treatment.

4) Other States Laws

The trial court's ordering Perry treated upon determining him incompetent (or competent only if treated), is nearly identical to the scheme for ordering treatment of death row inmates pursuant to competency determinations that was adopted by Florida in response to Ford. In Ford, the United States Supreme Court rejected the Florida procedures for determining a death row inmate's competence to proceed to execution.

In response to the rejection of its competency determination procedures, Florida adopted Florida Rule of Criminal Procedure, 3.811, which provdes in part:

* * *

(b) Disposition on finding of incompetency.

(1) If the court determines that the prisoner is not mentally competent to be executed, the court shall stay the execution and order the prisoner committed to a Department of Corrections mental health treatment facility. The order of commitment shall contain the following:

(a) Findings of the fact relating to the issues of competency to be executed and involuntary hospitalization.

* * *

(c) Any other written submissions relative to the prisoner's competency to be executed received by the court.

(2) The treatment facility shall admit the prisoner for hospitalization and shall retain and treat the prisoner.

* * *

(3) Within thirty days of receiving any report from the treatment facility's administrator, the court shall consider that report and any written submissions from the parties and may allow the presentation of oral argument. If the court determines that the prisoner continues to be incompetent to be executed, the court shall order continued hospitalization and treatment for a

period not to exceed one year. The procedure shall be repeated prior to the expiration of each one-year period of hospitalization.

(4) If at any time after hospitalization under this rule the court decides that the prisoner is competent to be executed, the court shall enter its order so finding and shall vacate its stay of execution.

(c) Effect of adjudication of incompetency to be executed; psychotropic medication.

(1) An adjudication of incompetency to be executed shall not operate as an adjudication of incompetency to consent to medical treatment or for any other purpose unless such other adjudication is specifically set forth in the order.

(2) A prisoner who, because of psychotropic medication, has sufficient ability to understand the nature and effect of the death penalty and why it is to be imposed upon him or her shall not be deemed incompetent to be executed simply because his or her satisfactory mental condition is dependent upon such medication.

Having been legislatively addressed, there is no doubt the intricacies of the Florida scheme for treating death row inmates is more complex than the scheme used by the trial court in ordering treatment for Perry. Yet the heart and substance of the trial court's order of treatment is virtually identical to the Florida scheme, legislatively adopted in response to Ford, for treating death row inmates whose competence to proceed to execution is maintained or achieved through treatment.

The foundation of each scheme is that upon an assertion of incompetence, and subsequent adjudication that treatment is necessary to achieve or maintain the inmate's competence to proceed, the inmate automatically and necessarily is required to submit to treatment.

An analysis of the Florida scheme bears these similarities out. The first step in the Florida procedure is that upon a court's determination that the prisoner is not mentally competent to be executed, the court "shall" stay the execution and order commitment to a Department of Corrections treatment facility. Fla. R. Cr.P. 3.811(b)(1)(emphasis supplied). This order of commitment must contain findings of fact relating to the order of involuntary treatment. Fla. R.Cr.P. 3.811(1)(1)(a).



The procedure further obligates the treatment facility to retain and treat the prisoner. Fla. R.Cr.P. 3.811(1)(2). This rule of procedure imposes a duty on the treatment facility to treat a prisoner, who is determined to require treatment, so that his competence to proceed to execution may be achieved and maintained.

This is a continuing duty to treat, as Rule 3.811 requires the maintenance of treatment even if the prisoner is determined to still be incompetent after a fixed period of time. Fla. R.Cr.P. 3.811(b)(3). Rule 3.811 also provides that the court may at any time after treatment vacate its stay of execution if the court decides the prisoner is competent to be executed. Fla. R.Cr.P. 3.811 (b)(4).

Rule 3.811 also expressly recognizes the court's ability to order and require treatment without the prisoner's consent. Fla. R.Cr.P. 3.811 (c)(1). This provision expressly recognizes the power to order treatment without consent within the adjudication of incompetency. As long as the order of treatment without consent is specifically set forth in the order of adjudication it is acceptable.

Finally, Rule 3.811 provides that a prisoner's competence, maintained through the use of treatment, is not invalid competence to proceed to execution simply because such competence or condition is dependent on treatment. Under Florida law, competence based solely on medication is valid so that a death row inmate may proceed to execution.

A comparison between the trial court's actions and the procedures required under Fla. R.Cr.P. 3.811 reveals a close parallel.

The trial court ordered continuing treatment for Perry upon determining his competence to proceed was achieved only when treated. This treatment was to be administered by the medical personnel of the Department of Corrections, based upon their professional judgment. This order of treatment, is analogous to the Florida provision requiring treatment upon a determination of incompetence.

The trial court's ordering treatment, even without Perry's consent, finds further credibility in Florida's provision allowing treatment without consent, so long as that

order is expressly provided in the original adjudication of incompetence. Florida's provision allows an order of treatment, even without consent if deemed necessary by the court, to be rendered within the initial determination of incompetence. No provision exists requiring a separate hearing on this question.

The Florida provision is simply a legislative recognition of the principle espoused in Louisiana by Hampton and its progeny. That is, competence maintained solely through the use of treatment or medication is valid competence for the individual to proceed, whether it be to trial or to execution.

The procedure employed by the trial court in ordering treatment of Michael Owen Perry comports with the procedural protections mandated by due process in this context. The validity of the scheme employed in ordering treatment upon a determination of incompetency (or that treatment is necessary to maintain competence) is in accord with the procedural due process protection required by Louisiana law, federal law, and Florida law (which was created in response to Ford).

The question of treatment is necessarily subsumed within the question of competence. This means that once the requisite procedural protections are afforded in determining that an inmate is incompetent (or requires treatment in order to maintain his competence), the court is required to order treatment, without the need for a subsequent hearing. The procedural protections mandated are those required in the competency hearing. Once provided, a determination of incompetence necessitates treatment. A second hearing would be superfluous.

Nevertheless, petitioner contends that his procedural due process protections were violated by the trial court's failing to adhere to the letter of La. C.Cr.P. art. 648 and R.S. 15:830.1. The State counters that petitioner is in error for two reasons. First, these two provisions are inapplicable to this proceeding. Second, the trial court's order of treatment satisfied the essence, if not the letter, of the requirements of each provision.

Petitioner asserts that either La. R.S. 15:830.1 or La. C.Cr.P. art. 648 are the provisions applicable to treating death row inmates pursuant to a determination that the inmate



is incompetent. Addressing La. R.S. 15:830.1 initially, it is readily apparent that this statute is inapplicable to this proceeding.

The reasons that R.S. 15:830.1 is inapplicable are numerous. First, the statute regulates the relationship only between the Department of Corrections and the inmate. La. R.S. 15:830.1 was enacted and intended for situations where the penal institution, and not the court, seeks to treat an inmate for his safety or for the safety of others connected with the institution. The statute, by its express terms and placement within the statutes, simply does not govern a proceeding where the question of competence to proceed to execution, and the necessity of treatment to maintain such competence, are adjudicated.

The second reason the statute is inapplicable in this proceeding is that its underlying purpose is a tool for the administration of prisons. This is reflected in its placement within the section of our revised statutes dealing with the Department of Corrections. The statute is simply a tool for ensuring that the best interests in administering the institution are carried out.

Third, the statute is designed to prevent the arbitrary and capricious administration of treatment to inmates by the prison staff. The statute provides a procedure which prevents prison administrators from treating an inmate, for its own purposes, for prolonged periods of time without prior court approval that the inmate is in need of treatment (i.e., that he is incompetent in the prison context - a danger to himself or others).

Fourth, the statute operates on the presumption that the inmate has neither actually nor constructively consented to the treatment. In Perry's case at present, we believe that he has consented to treatment by provoking this competency proceeding.

Finally, the standard used in the statute for requiring treatment is that treatment is necessary to prevent harm to the inmate or to others. The statute, by its express terms, cannot regulate treatment required to maintain an inmate's competence to proceed to execution. The standard used simply does not contemplate the use or necessity of treatment to maintain competence to proceed to execution.

Since La. R.S. 15:830.1 is inapplicable to this proceeding, the trial court's ordering treatment without following the exact requirements of the statute, such as the filing of a petition stating the reasons for treatment, did not violate due process. Though inapplicable, the statute is valuable, as utilized by the trial court, as a measuring stick of what procedure due process requires in treating a death row inmate whose competence is maintained through medication.

La. R.S. 15:830.1 authorizes the court to treat an inmate if pursuant to a contradictory hearing, the court determines that treatment is necessary to prevent harm or injury to the inmate or others. This means that the court, after determining the inmate's incompetence by the applicable standard, is required to order treatment if it is necessary to maintain or achieve the inmate's competence. The statute does not provide for a second hearing. A determination that without medication the inmate may cause harm to himself or others (i.e., incompetent) necessitates that the court order treatment and that the inmate submit to treatment. The statute requires an adversarial hearing on the question of competence. Perry received such an adversarial hearing in regard to the question of competence.

This same line of reasoning applies regarding the inapplicability of La. C.Cr.P. art. 648 to this proceeding. Petitioner argued that in the alternative to La. R.S. 15:830.1, La. C.Cr.P. art. 648 was the mandatory provision for determining whether a death row inmate could be treated so as to achieve or maintain competence. Yet, as with La. R.S. 15:830.1, there are numerous reasons arguing against the applicability of art. 648 to this proceeding.

The first of these reasons is that the language employed shows a clear legislative intent that the provision was enacted to deal solely with pre-trial capacity determinations. The language used in art. 648 speaks of "defendants," "charges," "outpatient care and release," and "proceeding with trial." Nowhere does the article recognize its application to death row inmates in proceedings determining the inmate's competence to proceed to execution.

The second reason is that the article, as did La. R.S. 15:830.1, employs unworkable standards for determining if treatment is necessary so as to maintain a death row inmate's



competence to proceed to execution. The article provides for the treatment of individuals incapable of standing trial, being released without being a danger to himself or others, or unlikely in the future to be capable of standing trial. No matter what verbal gymnastics one attempts, it is impossible to fit a death row inmate, sentenced to die for murdering five persons, into any of these pigeonholes.

Third, Henson, supra, does not stand for the proposition that art. 648 regulates the treatment of a death row inmate so that his competence to proceed to execution may be maintained. Perry latches on to dicta in Henson stating that "the issue of ... mental incapacity to proceed may be raised at any stage of the proceedings, even after conviction," Henson, at 1173, for the proposition that art. 648 must regulate treatment of Perry.

This notion must be rejected, however, because Henson simply did not contemplate the application of art. 648 to a proceeding encompassing issues involving a death row inmate's competence to proceed to execution. The facts in Henson bear this out. The defendant in Henson had been convicted, yet when he raised the issue of incompetence, he had not yet been sentenced and there had been no determination of any post-trial motions, such as a motion for a new trial. In a practical sense, the prosecution had not yet ceased.

In petitioner's case, he is clearly beyond the stage in the criminal proceeding that the defendant in Henson was when he raised the issue of his incompetence. Perry has been tried, convicted, and sentenced to death for murdering five persons and his sentences and convictions have been upheld through the highest court in the land.

Yet Perry asserts that his position is the same as the defendant's in Henson; therefore, he cites dicta in support of his belief that Henson is controlling in this proceeding. The distinctly different facts, and common sense, dictate otherwise; that is, that the court in Henson simply did not contemplate the application of art. 648 in this stage of a criminal proceeding.

Finally, in his plurality opinion in Ford, Justice Marshall failed to recognize art. 648 (or La. R.S. 15:830.1) as procedures for the regulation of treating death row inmates for

achieving or maintaining competence in his review of state law. Justice Marshall recognized seven states which have statutory procedures providing for the suspension of sentence and the transfer of the inmate to mental facilities. Ford, at 2602, footnote 2. Louisiana was not listed among these states.

Yet like La. R.S. 15:830.1, art. 648 can be a useful analogy of the type of procedure required by due process in this proceeding. There must first be a hearing, before a detached magistrate, on the question of the inmate's competence to proceed. Once it is determined that the inmate is incompetent (or is competent only when treated) the court necessarily must order treatment, even without consent. Implicit in this adjudication of incompetence (or competence maintained through treatment) is the inmate's submission to treatment.

The questions of competence and treatment are inextricably intertwined. It is not only impractical, it is unworkable for a court to render a determination that an inmate is incompetent (or is competent only while treated) yet be without authority to render a determination ordering treatment.

It is untenable to think a court, upon determining incompetence (or competence maintained only through treatment) cannot order treatment, but must initiate a second, separate proceeding to determine if it can treat the inmate. Neither state nor federal law require such an absurd result.

Accordingly, the State asserts that the procedure of ordering treatment upon a determination of incompetence satisfies due process. A proceeding determining competence necessarily subsumes a determination on the necessity of treatment. The trial court did not offend due process by ordering treatment upon its determination that Michael Owen Perry is incompetent (or competent only when treated).

G. The trial court's ordering treatment of Michael Owen Perry comports with the Eighth Amendment and La. Const. Art. 1, §20.

The Eighth Amendment to the United States Constitution prohibits the imposition of "cruel and unusual" punishment. La. Const. art. 1, §20 prohibits any person from being subjected to "cruel, excessive, or unusual" punishment.



The Unites States Supreme Court and the Louisiana Supreme Court have held that the imposition of the death penalty for the crime of first-degree murder is not violative of either the federal or state constitutions as "cruel and unusual" punishment or as "cruel, excessive, or unusual" punishment. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); State v. Myles, 389 So.2d 12 (La. 1980). Absent some other imposition of punishment, a condemned inmate's execution based on medically maintained competence does not violate the Eighth Amendment or La. Const. art. 1, §20.

Since competence maintained by treatment is valid to proceed to execution, it is clear that no constitutional violation exists by executing Perry based on this competence. Therefore, for an Eighth Amendment violation to occur in this situation, there must necessarily exist some other evidence of a punishment outside of simply being executed based on medically maintained competence.

Yet what does the evidence show? It shows that the court's order of treatment is not a constitutional violation; rather, it is the fulfillment of the State's obligation to treat the medical needs of inmates. The evidence shows that the treatment ordered is the standard form of treatment for this illness, and is the treatment prescribed by the doctors.

The evidence also shows that the treatment ordered is beneficial to Perry. Perry himself admits to its beneficial aspects in making him feel better. (R. p. 0564) The evidence further shows the existence of no side effects. (R. p. 0746).

Finally, the evidence shows it was not the court's ordering treatment that violated the Eighth Amendment. If any constitutional violation occurred, it occurred through the removal of Perry from treatment, thereby "sentencing" him to a life of insanity, a punishment clearly prohibited under both the Eighth Amendment and La. Const. art. 1, §20.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) recognized the State's duty and obligation to provide medical care for inmates under the Eighth Amendment. The court stated that the "deliberate indifference to serious medical needs of prisoners constitute the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." Gamble, at 291.

After a judicial determination that Perry requires treatment to maintain competence, to refuse the court the authority to order treatment of a mentally deteriorating inmate would surely constitute deliberate indifference to the prisoner's medical needs. If Perry were not on death row, would he contend the State was not obligated to provide treatment for his mental illness? The trial court's order of treatment, even without Perry's consent, constitutes a judicial decision prohibiting "deliberate indifference" to Perry's medical needs, thereby ceasing the unnecessary and wanton infliction of a "life" of insane incarceration.

The court ordered treatment comports with the Eighth Amendment by refusing to allow the inmate's mental condition to deteriorate, thereby sentencing Perry to an unjustifiable punishment of a life of madness. As the Supreme Court stated in Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2393, 69 L.Ed.2d 59 (1981), the Eighth Amendment prohibits the unnecessary and wanton inflictions of pain that are "totally without penological justification." Rhodes, at 2399.

A sentence of death for the crime of first-degree murder has been approved by the people of this state. Yet no law exists holding that a life of insane incarceration for the commission of a crime serves a penological or societal justification. Therefore, the court's order requiring treatment is not a violation of the Eighth Amendment or La. Const. art. 1, §20; rather, it is the fulfillment of an obligation required by those provisions to prohibit the sentencing of an individual to a life of insane incarceration.

The trial court's ordering treatment for Perry is not violative of the Eighth Amendment or La. Const. art. 1, §20, because treating Perry would alleviate his illness and maintain his competence. Can Perry honestly claim that treatment which stabilizes his competence is cruel or unusual punishment?

It is clear that the treatment prescribed by Perry's physicians does not constitute cruel or unusual punishment. What the evidence does show is that the medication prescribed and ordered for Perry is not punishment; rather, the prescribed treatment is an acceptable and recommended mode of treating individuals suffering from schizoaffective disorder.



The evidence and testimony presented by the doctors who have participated in the previous treatment of Perry clearly supports this contention. It is also clear from the evidence and testimony that this belief is consistent throughout: medication is not only the recommended form of treatment, it is clearly beneficial to Perry's mental state.

Dr. Jimenez, who treated Perry during his co..finement at Feliciana Forensic Institute, testified as to the direct correlation between treatment, Perry's competence, and the medication's benefits to his mental condition. In response to questions from the court and petitioner's counsel at the October 21st hearing, Dr. Jimenez's testimony was consistent throughout. That is, treatment maintains Perry's competence and alleviates the symptoms of Perry's illness.

In response to questions by the trial court, Dr. Jimenez stated:

[By the court]:

Q. Now, were you aware of the fact that he had had an injection of, ah, what I'll call, ah, the long-term, long-affecting Haldol on September 3rd?

A. Yes, sir, I did. He received Haldol Decanoate 2 CC IM September the 3rd, 1988. He had been sporadically taking his medication. Apparently, after that, the Haldol by mouth, but three days before I saw him he had completely refused to take his medication by mouth.

Q. Now, my notes indicate that he was given oral short-term Haldol on September 11th, which would have been two days before your September 13th examination, do your notes reflect that?

A. What I have, sir, is the Haldol ten milligrams, refusing very often, took once in three days; that would be pretty close, what you have.

Q. And at the time that you saw him on September 13th, was he psychotic?

A. No, sir. He was pretty stable, based on my examination and evaluation.

Q. All right. Let's move on to September 26th, did your examination take place in the same area of the prison?

A. Yes, sir. The same place, and I asked him the same questions, and he told me that I've asked those questions several other times in the past. And, again, I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him, and he was able to do so.

Q. Was he psychotic on September 26th, in your opinion?

A. No, sir, he was not.

Q. And at that time, his last medication injection would still have been September 3rd, is that correct?

A. That's right, sir.

(R. at 0753-4) (Emphasis supplied).

In response to questions posed by petitioner's counsel regarding treatment, Dr. Jimenez stated:

[By Mr. Nordyke]:

Q. Yes, sir. Just a few. Doctor, on the 26th when you saw him, the effects of the Haldol-D was still present in Michael's system, weren't they?

A. Yes, sir.

Q. In fact, Haldol-D is a long-lasting psychotropic?

A. That's true, sir. The effect usually last from three-to-four weeks.

Q. So the fact that he was not psychotic when you saw him on the 26th shouldn't surprise you at all considering the Haldol, did it?

A. That's true, sir.

(R. at 0755) (Emphasis supplied).

It is clear that Dr. Jimenez believes medication is not only appropriate, but effective in treating Perry's condition.

This testimony is consistent with that previously given at and in connection with the April 20th hearing. In a report of March 10, 1988, Dr. Jimenez wrote that, "Mr. Perry will become competent with the proper medication adjustment." (R. at 0025). This belief was corroborated by the doctor's testimony at the April hearing.

[By the court]:

Q. Review your report and then answer the question.

A. I indicated ... that I feel that Mr. Perry will become competent with the proper medication adjustment.

(R. at 0510-1).

This testimony of Dr. Jimenez regarding the correlation between treatment and Perry's competence is



consistent with the testimony of Dr. Cox. In response to questions by the court at the September 30th hearing, Dr. Cox stated:

[By the court]:

Q. The last time you were in this court, Dr. Cox, your testimony was that he does respond to medication when he is on it.

A. Yes, sir.

Q. Your opinion is still the same on that?

A. Yes, sir.

Q. You also said that -- of course, my ultimate decision will be what does competent mean -- but your testimony at the previous hearing was, when he's on medication he's competent and when he's not on medication he's not competent. Is that still your opinion?

A. That's basically it, sir.

Q. Let me ask you some question to maybe educate me a little bit in this area. This Haldol that's being or has been given by way of injection and by use of some type of oral medication, this is what's called an anti-psychotic drug, is that correct?

A. Yes, sir, that's correct.

Q. Are there any other type of lesser controversial drugs, such as, tranquilizers or sedatives that would enhance or assist Mr. Perry in maintaining competency?

A. No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs. That's a specific class in pharmacology.

(R. p. 9745).

It is clear that Dr. Cox advocates treatment for Perry not only to maintain petitioner's competence, but because his condition responds favorably to treatment. It is also clear that Dr. Cox advocates the continued treatment of Perry with the class of medication ordered by the trial court.

This belief is consistent with Dr. Cox's opinions expressed pursuant to the April 20th hearing. In a report dated April 20th, Dr. Cox stated:

> "On neuroleptic medication, he has been in fairly good contact with reality, and certainly did appreciate the seriousness of his situation and the purpose of his death sentence.

* * *

> It is my opinion that if Mr. Perry is allowed to remain off neuroleptic medication for any significant period of time (by this I mean three weeks or longer), I believe he will become so psychotic that he will not be competent to be executed. (Report of Dr. Cox dated April 20, 1988).

Dr. Cox's testimony, in response to questions posed by the court, the State, and petitioner's counsel, corroborated his opinions expressed in the report.

[By the court]:

Q. I understand that. But my question is do you agree with their ...

A. That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q. And does Haldol affect him beneficially?

A. Yes, sir, when he takes it in adequate doses it affects him beneficially.

(R. p. 0554-5).

Dr. Cox went on to state later in his testimony in response to the court's questioning that:

[By the court]:

Q. ...based on your examination of him on March 3rd, 1988 when he was on Haldol, at that point in time, in your opinion, was he sane or insane?

A. At that point in time, in my opinion, he was able to distinguish right from wrong.

Q. Also, on that date in question when he was on Haldol did he have the capacity to know of the fact of his impending execution?

A. Yes, sir, I went into that with him that day specifically as I do most of the time when I see him. He was aware of where he was, he was aware that he was under a sentence of death. He was aware that he could be killed by the electrocution, and he was aware of why he was there.

Q. That was my next question. Did he understand the reason for the death penalty...

A. Yes, sir.

Q. ...being imposed?

A. He did, though at that time he denied his guilt to me for the crime. And he knew why he was there.



(R. p. 0566).

In response to questions posed by the State regarding the beneficial aspects of treatment, Dr. Cox not only expressed his opinion that treatment alleviated Perry's illness, he reported Perry's own beliefs that treatment made him (Perry) feel better:

[By Mr. Salomon]:

Q. Have you ever utilized any specific tests in order to confront the question of malingering while medicated?

A. I don't know of any specific tests that exist. When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's a change in his function.

(R. p. 0564).

In an attempt by petitioner's counsel to impeach or rebut the doctor's previously expressed views, Dr. Cox emphatically reiterated the direct correlation between treatment and competence:

[By Mr. Nordyke]:

Q. And even after the forced treatment and massive doses of Haldol and he's still sometimes floridly psychotic?

A. He gets better. In my mind I think I settled the issue, in fact, I know I settled the issue. He does respond to medication when he's given it and he gets better.

(R. p. 0557; emphasis supplied).

Finally, Dr. Kovac, the administrator of the hospital at Angola, rendered her opinion on the benefits Perry receives from treatment:

[By Mr. Nordyke]:

Q. And, in fact, Michael's affect and delusional status can vary from day to day, can it not?

A. It depends on -- just in my limited experience with Michael, it depends on whether he had taken his medication.

Q. But it does vary from day to day?

A. Well, just using this example -- this week as an example it hasn't varied, you know, what I saw Monday was the same as I saw yesterday.

Q. That's because you gave him -- that's because he was given a shot of Haldol-D on September 3rd?

A. That's correct, because he had his medication.

(R. p. 0724).

What conclusion can be gleaned from this testimony? Simply that treatment not only maintains Perry's competence to proceed to execution, but that medication is an acceptable, recommended, and beneficial course of action in treating Michael Owen Perry's mental condition.

Finally, petitioner argues that treatment violates the Eighth Amendment and La. Const. art. 1, §20 because of the potential for side effects. Yet an examination of the evidence clearly refutes any notion that Perry suffers any of the alleged severe side effects as a result of the medication.

In his testimony of September 30th, Dr. Cox stated he had not seen Mr. Perry suffer any side effects whatsoever.

[By the court]:

Q. Have you seen any side effects of Mr. Perry...

A. I have not seen...

Q. ...in that way?

A. I have <u>never</u> seen Mr. Perry have side effects.

(R. p. 0746; emphasis supplied).

This testimony simply reiterated Dr. Cox's previous statements regarding the fact that Perry does not suffer any side effects from the treatment:

[By Mr. Salomon]:

A. Do I think he has tardive dyskinesia now?

Q. Yes.

A. <u>No, I do not think he has it now</u>.

Q. What would it take for him to become a member of that class disfunction?

A. There is a hazard if he continues taking these medications indefinitely, say for the next five years or so, that he's got a twenty to twenty-five percent risk of developing this complication.

(R. pp. 0574-5; emphasis supplied).



Dr. Cox clearly believes that Perry does not suffer from tardive dyskinesia, or any other side effect due to his undergoing treatment. Dr. Cox also discounts the possibility of any side effect ever manifesting itself because of medication as slight, and possible only after an extended period of treatment.

In fact, not only does Perry not suffer from any serious side effects as the result of medication, he has been diagnosed as exaggerating some of the lesser side effects recognized as possible from use of the treatment. Dr. Jimenez testified that Perry has on occasion exaggerated some side effects:

[By Mr. Salomon]:

Q. All right. Now you mention that he exaggerated what, his symptoms?

A. Yes, sir.

Q. And can you explain to me how would he exaggerate those symptoms?

A. He would -- at times he would be able to move and at times he would not move at all. And, in fact, there was a time there when he would stay just in bed because he claimed he couldn't move.

(R. pp. 0528-9).

Though some question exists as to whether Perry suffers some minor symptoms of the less severe side effects of treatment (outside of his diagnosed exaggeration) these simply do not amount to an Eighth Amendment violation for two reasons. The first is the substantial benefits of treatment, documented and previously discussed. Second, is that these symptoms can be effectively controlled by medication.

Extra Pyramidal Syndrome (EPS) is a potential lesser side effect of Haldol treatment. Though dispute exists as to whether Perry has actually ever suffered EPS symptoms, whether he has or has not does not negate the fact that this potential side effect, and its attendant symptoms, can be effectively controlled by medication.

EPS side effects from anti-psychotic medications can be effectively treated by medication. Benadryl, Akineton, Artane, Parbodel, and Parsidol are all recognized as effective treatment for drug induced EPS symptoms. In addition,

Symnetiel is recognized as an effective treatment specifically created and intended as treatment for drug induced EPS reactions. (Physician's Desk Reference, 43 Ed., 1989). Should Perry ever develop EPS symptoms, these symptoms can be alleviated with no adverse effects, with the proper medication.

Outside of the potential for side effects, petitioner's counsel claims the administration of antipsychotic medication, specifically Haldol, violates the Eighth Amendment and La. Const. art. 1, Section 20 because of his equating this medication with a frontal lobotomy. Petitioner's counsel makes the broad claim that the same drastic effects resulting from a frontal lobotomy are those that result from Haldol treatment. This assertion must be dismissed as folly, in light of the doctors' testimony regarding Haldol treatment and its everyday use by one special, talented young man.

For those unfamiliar with the Louisiana sports scene, Chris Jackson is a freshman basketball player at Louisiana State University. An All-American, Jackson has been hailed as the second coming of a former basketball star, Pete Maravich. Yet in a recent national publication, it was revealed that Chris Jackson suffers a neurochemical disorder known as Tourette syndrome, which manifests itself in uncontrollable moans, arm and hand-flapping and spasmodic twitching and blinking. However, this disorder has been effectively brought under control by Chris Jackson's everyday use of a specific medication: Haldol. "Can't Hold This Tiger," Sports Illustrated, February 20, 1989, pp 48-51. (Emphasis supplied).

Surely even petitioner's counsel must hesitate in claiming that an individual who has suffered the drastic effects of a frontal lobotomy could perform in any arena with the skill, courage, and acumen Chris Jackson performs with on a basketball court. Petitioner's unfounded claim that Haldol treatment equates with a frontal lobotomy must fall under the weight of its own pretense.

Petitioner's counsel vociferously espouses claim after claim in an attempt to prove that treatment of Perry constitutes a violation of the Eighth Amendment or La. Const. art. 1, Section 20. Ultimately, if any violation of either constitutional provision has occurred, it has been at the hand of Perry's own counsel.



Mr. Nordyke's actions in ordering Perry removed from treatment of Haldol prior to the sanity hearings may have created an enormous opportunity for tardive dyskinesia, the most serious potential side effect of Haldol treatment, to appear. Product information available to date in regard to Haldol pertinently states in part:

> "Withdrawal Emergent Neurological Signs - Generally, patients receiving short term therapy experience no problems with abrupt discontinuation of antipsychotic drugs. However, some patients on maintenance treatment experience transient dyskinetic signs after abrupt withdrawal. In certain of these cases the dyskinetic movements are indistinguishable from 'Tardive Dyskinesia' except for duration. It is not known whether gradual withdrawal of antipsychotic drugs will reduce the rate of occurrence of withdrawal emergent neurological signs, but until further evidence becomes available, it seems reasonable to gradually withdraw use of Haldol." Physician's Desk Reference, 42nd Ed., 1988, at p. 1239.

Without regard for medical opinion, counsel for petitioner abruptly removed petitioner from Haldol treatment in an apparent attempt to manipulate the criminal justice system. In so doing, counsel for petitioner subjected Perry to the potential for the same adverse effects he claims that the state imposes on Perry in treating petitioner with Haldol.

Yet an even greater injustice in these actions is the attempt at festering and promoting insanity in Michael Owen Perry. As an officer of the court, counsel for petitioner arbitrarily assumed the role of judge and jury, and rendered a judgment sentencing Perry to a life of insane incarceration by removing him from medication that was clearly beneficial to his mental condition. In so doing, counsel for petitioner sentenced his client to a punishment with absolutely no penological and, more importantly, no societal justification.

For these reasons, the State asserts that the trial court's order of treatment is valid under both the Eighth Amendment and La. Const. art. 1, Section 20.

H. The trial court's ordering treatment of Michael Owen Perry comports with the exercise of petitioner's personal rights.

The State asserts that once a death row inmate raises the issue of incompetence, and it is determined that the inmate is incompetent, or is competent only if maintained on treatment, the inmate must submit to treatment. The inherent nature of a competency proceeding requires that once an inmate questions his competence to proceed, is provided the requisite procedural protections in reaching a determination on that issue, and is adjudicated incompetent (or in need of treatment) by a detached judicial officer, the court is required to order treatment.

Yet if it is determined that these questions are not inextricably intertwined, requiring submission to treatment upon a determination of its necessity, the State further asserts that the trial court's order is valid and not violative of any right Perry may have in refusing treatment. The reason being that the State's legitimate interests in retribution, finality of sentence and providing medical assistance to mentally ill prisoners in its custody overrides any interest Perry has in refusing treatment.

Petitioner asserts a right to be inviolate from forcible medication. Yet forcible treatment of individuals pursuant to legitimate state interests has a long history in our constitutional framework.

In Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) the Supreme Court was faced with a question of whether an individual had a right to refuse a state required vaccination. In rejecting the individual's right to refuse the treatment, the court stated:

> "The defendant insists that (treatment is) ... hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best, and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. ...Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." Jacobson, 25 S.Ct. at 361.



As far back as the turn of the century, the right to refuse forcible medication has been held to yield to legitimate state interests. This principle is even more persuasive when involving a death row inmate's attempt to forestall his execution by refusing treatment that maintains his competence to proceed.

The State acknowledges that Perry has not forfeited all constitutional rights simply by reason of his conviction and incarceration. Yet the Supreme Court in Bell v. Wolfish, 441 U.S. 520, 49 S.Ct. 1861, 60 L.Ed.2d 447 (1979), recognized that:

> "Simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights." Bell, at 1877.

The court has also applied this rationale to the restriction of inmate's fundamental rights, stating that these are also "subject to substantial restriction as a result of incarceration." Turner v. Safley, 107 S.Ct. 2254, at 2556 (1987).

The State does not seek to medicate Perry based solely on his incarceration. Yet the fact of his conviction and incarceration for the murder of five persons necessarily gives great credence to the legitimacy of the State's interest in retribution.

Retribution has been held to constitute a legitimate state interest in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In holding that retribution and deterrence of capital crimes were legitimate state interests in validating the death penalty, the court stated that retribution is not a "forbidden objective nor one inconsistent with our respect for the dignity of men." Gregg, at 2930.

This holding was reaffirmed by the court in Ativeh v. Capps, 449 U.S. 1312, 101 S.Ct. 829, 66 L.Ed.2d 785 (1981). In reiterating its views expressed earlier determining that retribution constituted a legitimate state interest, the court stated:

> "There is nothing in the Constitution that says that rehabilitation is the sole permissible goal

of incarceration, and we have only recently stated that retribution is equally permissible." Ativeh, at 830.

It is clear that the State's legitimate interest in retribution must necessarily override Perry's right to refuse treatment. The State's interest in retribution for the murders of five of its citizens cannot be forestalled by a death row inmate's attempts to subvert the criminal justice system by refusing treatment.

The State's interests in retribution and the execution of validly imposed sentences were also recognized as legitimate by Justices Powell and O'Connor in Ford. Justice Powell forcefully asserted these interests in stating:

> "... the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question is not whether, but when, his execution may take place. This question is important, but it is not comparable to the antecedent question of whether petitioner should be executed at all." Ford, at 2610.

Justice Powell reiterated this view, that the State's legitimate interest in retribution supersedes an inmate's right to refuse treatment that maintains his competence to proceed to execution, in stating:

> "I consider it self evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, at 2612. O'Connor, J., concurring in the result in part and dissenting in part.

A common thread runs throughout these decisions; that is, retribution is a legitimate state interest. Having been determined to be a legitimate state interest, it is apparent that this right of retribution must necessarily override a death row inmate's attempts to subvert his validly imposed sentence of death by refusing treatment that maintains his competence.

The State, and society, clearly have valid, legitimate interests in carrying out its constitutionally established



interest in retribution. The State, and society, have a constitutionally legitimate interest in executing an inmate lawfully convicted and sentenced for the murder of five of its citizens. Having established this right and interest in retribution, any right Perry has in refusing treatment must fall.

As previously set forth, the State has a constitutionally mandated duty to provide medical care for inmates under the Eighth Amendment. See Estelle v. Gamble, supra. The State clearly has an interest in providing treatment for an individual in its custody who suffers from mental illness. To deny the State the ability or opportunity to treat a mentally ill inmate would force the State to violate its duty, under the Eighth Amendment, of providing medical care to those in its custody who require treatment.

Finally, petitioner's counsel argues that forcible treatment violates Perry's First Amendment rights to free speech and thought. A review of the beneficial aspects of treatment regarding Perry's mental state points to the contrary.

A lengthy, yet relevant, excerpt from the testimony of Dr. Cox at the April 20th hearing bears this out:

[By Mr. Salomon]:

Q. Okay. And what illness is the specific case Mr. Perry endures?

A. He's being given this drug because he has a diagnosis of Schizoeffective Disorder.

Q. And this neuroleptic drugs will suppress what particular symptoms of Schizoeffective Disorder?

A. Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make his less labile and agitated.

Q. Okay, so you told me he would become passive, it will reduce his delusions...

A. Not passive, but he will...

Q. Less hostile?

A. Less hostile, less aggressive, less bouncing around off the wall.

Q. All right, so, what else do we have besides less hostile, and no delusions or reducing...

A. Thinking more coherently, and more in contact with his environment.

Q. More coherently means what?

A. Well, more coherent means that he could sit down and give me--I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. If, for example, I ask him, for example, tell me what happened when you were in the hospital last week, he's able to sit down and tell me what was going on, why they took him to the hospital, how long he was there, etcetera, etcetera, in a coherent fashion. When he's not on medication he rambles so that he goes from talking about the hospital to something that happened before he ever came to Angola, to something else that is completely unrelated.

The testimony of Dr. Cox shows that the treatment alleviates the symptoms of Perry's mental illness. Rather than clouding Perry's ability to think clearly, the treatment actually allows Perry to think and communicate in a rational, coherent manner. Instead of infringing on these First Amendment rights, the treatment actually enhances Perry's ability to exercise these rights; therefore, treatment cannot be deemed to violate either the right to free speech or thought guaranteed by the First Amendment.

For these reasons, the State asserts that its interests in retribution, executing valid sentences, and providing care for persons in its custody supercedes any interest Perry may be deemed to possess in refusing treatment. Wherefore, the trial court's determination of competency to be executed and order of continued treatment should be affirmed.



## XI. THE TRIAL COURT'S CONDUCT OF THESE PROCEEDINGS SURPASSED CONSTITUTIONAL REQUIREMENTS

The inmate now contends that the hearing afforded to him was inadequate to ensure against the arbitrary deprivation of his right not to be executed while insane (incompetent). He asserts an amalgam of claimed errors. The claims range from broad challenges of the entire proceeding to assertions that specific matters were erroneously utilized by the trial court. For the most part, the claims are conclusory with little or no discussion of what Louisiana's procedures accompanying the inquiry into competency to be executed should be.

The State prefers to first ask what does the U.S. Supreme Court require in Ford v. Wainwright, supra; second, what procedure has the inmate been afforded in the present inquiry into his competency to be executed; third, what has Louisiana mandated as the procedure to accompany the inquiry into competency to be executed; fourth, what are the alleged specific errors committed by the trial court; and fifth, do the alleged errors amount to a denial of basic fairness.

The State respectfully submits that a thoughtful and thorough analysis of what in fact transpired herein will conclusively demonstrate that the trial court's conduct of these proceedings surpassed constitutional requirements.

A. Ford v. Wainwright establishes guideposts in determining the procedures which must accompany the inquiry into competency to be executed.

As now Chief Justice Rehnquist pertinently stated in Ford:

> "Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity." Ford, 106 S.Ct. at 2615, (Rehnquist, J., dissenting).

The state of Florida's procedures accompanying the inquiry into sanity were genuinely at dispute in Ford v. Wainwright. Florida procedures basically amounted to the Governor appointing a panel of three psychiatrists to evaluate whether, under Florida Statute §922.07(2)(1985), the inmate had the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him. The

commission was required to report its findings to the Governor who had the final decision on whether the inmate was competent and whether a death warrant should issue.

The Court in Ford garnered a majority with regard to Justice Marshall's parts I and II. In parts I and II, five Justices (Marshall, Brennan, Blackmun, Stevens and Powell) agreed that the Eighth Amendment established a substantive prohibition against the execution of the insane. Further, these same five Justices concurred that the federal district court was obliged to hear Ford's claim on collateral review because the Florida statutory procedure was inadequate to receive a presumption of correctness according to 28 U.S.C. §2254(d).

The divergence of opinion within the court is apparent on the question of what procedure must accompany the inquiry into sanity. The dilution of Justice Marshall's majority occurs with the concurring opinion of Justice Powell. The split revolves around the necessity of a "full-scale sanity trial," according to Powell's interpretation of Marshall's opinion. Marshall did not, in fact, refer to a "full-scale sanity trial." What Marshall actually stated was: "[w]e do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests...." Justice Powell may have erroneously expanded on Marshall's concept of what procedure is necessary to enforce the Eighth Amendment right not to be executed while insane. Ford, supra, at 2610.

Justices Powell and Marshall also differ on what the "opportunity to be heard" standard entails. Further, Justices O'Connor and White have additional, but different, views of what procedural due process requires in the context of determining competency to be executed. Specifically, O'Connor and White suggest that an "opportunity to be heard" would not invariably require oral advocacy or even cross-examination. Ford, 106 S.Ct. at 2613.

Justice Marshall concluded that the Florida procedures for determining competency to be executed were inadequate to preclude federal determination of the constitutional issue. He identified the Florida deficiencies as:

> 1. Failure to include the prisoner in the truth-seeking process. He found this failure to be premised upon the fundamental requisite of due process of law embodied within the concept of an "opportunity to be heard." Marshall found this failure to be particularly repugnant in view of the fact that "state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution." Ford, 106 S.Ct. at 2604. Further, the Governor had an announced policy of not considering any evidence which the prisoner might submit.
>
> 2. "A related flaw in the Florida procedure is the denial of any opportunity to challenge or impeach the state-appointed psychiatrist's opinions." Ford, 106 S.Ct. at 2605. Such denial of ability to "challenge the state expert's opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted." Id.
>
> 3. Finally, Marshall opined: "Perhaps the most striking defect in the procedures... is the State's placement of the decision wholly within the executive branch." Id. This "most striking defect" is premised upon the recognition that no constitutional right has ever been entrusted to the unreviewable discretion of an administrative tribunal.

Justice Powell also examined the Florida procedures for determining an inmate's competency to be executed. The examination likewise addressed whether Florida's procedures comported with the requirements of procedural due process. Powell, like Marshall, concluded that:

> "[T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process." Ford, 106 S.Ct. at 2610.

Justice Powell's conclusion that Florida's procedure failed to comport with due process is premised upon a somewhat different foundation than that of Justice Marshall. Powell pertinently states:

> "[I]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" Ford, 106 S.Ct. at 2609-10.

Powell believes that this opportunity was denied in Ford's case since "[t]he Florida statute does not require the Governor to consider materials submitted by the prisoner, and the present Governor has a 'publicly announced policy of excluding' such materials from his consideration." Ford, 106 S.Ct. at 2610.

In essence, Powell would require the State's procedures to include "an impartial officer or board that can

receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the state's own psychiatric examination." Ford, 106 S.Ct. at 2611. This view differs from Marshall's purported "full-scale sanity trial" which is akin to procedures commensurate with post-arraignment adversarial capital proceedings. Powell has chosen to distinguish his suggested standard on the basis that due process "require[s] only 'such procedural protections as the particular situation demands.'" Ford, 106 S.Ct. at 2610. (Quoting from Matthews v. Eldridge, 96 S.Ct. 893, 902).

The State herein suggests, as does Justice Powell, that "a number of considerations support the conclusion that the requirements of due process are not as elaborate as Justice Marshall suggests." Ford, 106 S.Ct. at 2610. First, the heightened procedural requirements on capital trials of guilt and sentencing do not apply in this context since the question of when an execution shall occur pale in view of the question of whether an execution shall occur. Second, the claim of incompetency is asserted in view of several claims prior to trial, which were adjudicated in favor of competency. Thus, the State can presume that the inmate remains sane at the time the sentence is to be executed. Third, the issues in this matter (of judging competency to be executed) are dissimilar to either trial or sentencing. This is a question for experts which is fraught with subtleties and nuances. Therefore, ordinary adversarial proceedings "are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." Ford, 106 S.Ct. at 2611. Quoting Powell "[a]s long as basic fairness is observed, I would find due process satisfied." Id.

Justice O'Connor, with Justice White joining, wrote separately to express her views on the requirements imposed upon the states by the due process clause. She basically concluded that the "demands are minimal in this context." Ford, 106 S.Ct. at p. 2612. Justice O'Connor viewed due process as requiring that the decisionmaker afford the condemned an "opportunity to be heard" before deciding whether he possesses the capacity to be executed. Id. O'Connor goes on to state:

> "While I would not invariably require oral advocacy or even cross-examination, due process at the very least requires that the decisionmaker consider the prisoner's written submissions." Ford, 106 S.Ct. at 2613.



O'Connor, like Marshall's plurality and Powell's concurrence, indicates her concern and dissatisfaction with the Florida Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." Id.

As commentators have concluded, "[t]he procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive." Note, Ford v. Wainwright: Warning - Sanity on Death Row May Be Hazardous To Your Health, 47 La. L.Rev. 1351, 1355 (1987). Consensus other than that hereinabove described is difficult, especially in light of the new court members Scalia and Kennedy.

The State of Louisiana, however, respectfully suggests that procedural due process satisfies basic fairness by providing the condemned with:

> (1) Inclusion of the prisoner in the truth seeking process (i.e., the "opportunity to be heard")(based on the expressions of seven justices, but for Rehnquist and Burger);
>
> (2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (Marshall's plurality);
>
> and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (Marshall's plurality and Powell's concurrence).

In view of the aforestated criteria, the State of Louisiana respectfully submits that Perry was afforded procedural due process in excess of constitutional requirements.

B. The inmate was afforded basic fairness in the conduct of an inquiry into his competency to be executed.

Michael Owen Perry was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The most illustrative method is to detail in a

laundry list fashion the privileges afforded to the inmate by the trial court:

(i) He was afforded the assistance of counsel;

(ii) He was afforded compulsory process;

(iii) He was afforded the right to present evidence on his behalf;

(iv) He was afforded the opportunity to choose half of the members of the sanity commission which evaluated him;

(v) He was afforded the right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi) He was afforded the privilege to participate in an adversarial hearing;

(vii) He was afforded the privilege to testify as a witness and be videotaped for posterity;

(viii) He was afforded the right to an independent and neutral decisionmaker outside of the executive branch of government;

(ix) He was afforded the privilege of judicial review.

A comparison to the essence of Ford reveals that the inmate benefited from Judge Hymel's version of procedural due process. As stated above, the inmate is truly limited to (1) the opportunity to present evidence on his behalf; (2) the right to challenge and impeach the experts; and (3) the right to an independent decisionmaker.

(i) He was afforded the assistance of counsel.

The record reflects that the inmate has benefited from numerous appellate counsel. Since the day of his sentencing he was represented by Messrs. Arcenaux and Romero. (R. p.6). Arcenaux and Romero withdrew from the representation on January 14, 1988. They were immediately replaced by Judith Menadue, Michael Vitiello, Keith Nordyke and June Denlinger. (R. pp. 15-18, 323-324). Further, Joe Giarrusso was also enrolled as



counsel of record for the inmate. (R. pp.2, 63-67). Throughout the proceedings, Perry has been represented by multiple counsel. At this time he maintains Giarrusso, Nordyke and Denlinger.

As is apparent from each of the inmate's legal representatives, they have each volunteered their time and efforts on his behalf. There is presently little or no authority for the proposition that the Sixth Amendment right to counsel extends to a post-conviction setting. The sole debatable authority for the necessity of counsel is La. C.Cr.P. art. 930.7(B) wherein it provides that "[t]he court shall appoint counsel for an indigent petitioner when it orders an evidentiary hearing...."

The State suggests that the present proceeding is neither a pre-trial adversarial setting nor a post-conviction application setting which mandates the providing of counsel. Nonetheless, the State respectfully submits that the inmate has never lacked for legal representatives. Therefore, the inmate has been afforded a greater degree of procedural due process than that mandated by the Fourteenth Amendment.

(ii) He was afforded compulsory process.

Beginning on the date of his enrollment as legal counsel, Mr. Nordyke exercised his right to compulsory process. (R. p. 1). On January 14, 1988, he requested and received immediate authorization to compel New General Hospital of the Louisiana State Penitentiary to produce all of the inmate's medical records. The court even went so far as to specifically ask defense counsel if he wished to present any evidence.

> Court: I understand. My question is: do you wish to present any evidence?
>
> Nordyke: No.
>
> Court: I want to give you the opportunity.
>
> Nordyke: No, Your Honor. (R. p. 762).

Throughout the period of January 14, 1988, to October 21, 1988, the inmate was permitted the opportunity to compel witnesses and documents in support of his cause. He chose to avail himself on some occasions and declined to do so on others. Nonetheless, the State respectfully submits that the inmate has never been denied the right to compulsory process.

(iii) He was afforded the right to present evidence on his behalf.

The inmate compelled the production of hundreds of pages of medical records from New General Hospital at Louisiana State Penitentiary. Every record he sought was introduced into evidence for the court's edification. (R. pp. 43-50, 85). At no juncture of this proceeding has the inmate asserted that he was denied the unfettered opportunity to present evidence in support of his contention that he has become insane subsequent to his conviction and sentence to death. As iterated above, defense counsel was given opportunities to present beneficial evidence. (Also see R. pp. 688 and 747).

(iv) He was afforded the opportunity to choose half of the members of the sanity commission impaneled to evaluate Perry's competency to be executed.

The minutes of court reflect that the trial court gave the inmate the ability to choose his own experts at state expense. (R. pp. 1-2, 19-20). This privilege certainly encompasses and supersedes Ford's suggestion that the inmate should be able to present evidence of an expert psychiatric nature different than the State's. Without a doubt, Perry has been afforded an opportunity not mandated by the procedural due process required in Ford. Therefore, the State respectfully submits that Perry has been afforded due process of law.

(v) He was afforded the right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed.

Four experts rendered opinions on the inmate's competency to be executed at the April 20, 1988 hearing. (R. pp.496-695). Each of these experts was tendered to the inmate for cross-examination and recross. The inmate examined each expert on his written report, interview with the inmate, judgment on diagnosis and treatment, as well as the inmate's medical history and mental health at Angola's death row since December 20, 1985.

Two experts rendered opinions on the inmate's competency to be executed at the September 30, 1988 hearing. (R. pp. 706-748). Each of these experts was tendered to the inmate for cross-examination and recross. He availed himself of this opportunity also. Once again, the inmate thoroughly



examined each expert on the facts underlying their expert opinions that Perry was competent to be executed.

On October 21, 1988, Dr. Jimenez appeared to render an expert opinion on Perry's competence to be executed. (R. pp. 749-797). Dr. Jimenez was subjected to cross-examination on her opinion that Perry understood the nature of the death penalty and why it was being imposed upon him. The inmate was denied no opportunity to fully explore her expert conclusions on his competency to be executed.

The State respectfully submits that the inmate was afforded his procedural due process guarantee of the opportunity to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed.

(vi) He was afforded the privilege to participate in an adversarial hearing.

Unlike the suggestion of Justice O'Connor (that oral advocacy and cross-examination need not be required, Ford, 106 S.Ct. at 2613), Judge Hymel permitted the inmate to fully participate in all aspects of the proceedings. Each hearing was conducted in the format of a contradictory hearing. The rules of evidence were understandably lax, especially in view of the fact that the trier of fact was the trial judge and the fact that expert opinions on a res nova issue were being presented. As both Marshall and Powell suggest, the purpose of a procedure is to encourage accuracy in the factfinding determination. Ford, 106 S.Ct. at 2606, 2611. Moreover, "The competency determination depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'" Ford, supra, at 2611, (quoting from Addington v. Texas, 99 S.Ct., at 1811). In fact, Justice Powell pertinently states:

> "This combination of factors means that ordinary adversarial procedures - complete with live testimony, cross-examination, and oral argument by counsel - are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." Ford, 106 S.Ct. at 2611.

Indeed, even Justice Marshall basically agrees with the above assessment, as is reflected in the following passage:

> "We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests...." Id. at 2606.

Although there is sufficient ammunition in Ford to argue that an adversarial hearing is not constitutionally required, the trial court afforded the inmate the privilege to participate in an adversarial hearing.

(vii) He was afforded the privilege to testify as a witness and be videotaped for posterity.

A corollary to the right to participate in an adversarial hearing was the inmate's right to testify. It is obvious that such a right is unusual since the inmate has great motives to advance spurious claims. As Justice O'Connor noted:

> "Moreover, the potential for false claims and deliberate delay in this context is obviously enormous." Ford, 106 S.Ct. at 2612.

Also, now Chief Justice Rehnquist has recognized the patent folly in permitting the inmate to testify:

> "[T]he requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity." Ford, 106 S.Ct. at 2615.

Nonetheless, the inmate's counsel called Perry to the witness stand as an "exhibit." (R. p. 6610). Such a stunt by inmate's counsel should be revealing of the manipulation being perpetrated by both the inmate and his attorneys.

Despite the tremendous potential for abuse, the trial court granted to Perry the right to testify. Furthermore, the trial court overruled the State's objection to the videotaping of this "event" or "show." (R. pp. 660-661). These privileges now exceed the de minimus protections afforded by procedural due process. The State respectfully submits that the inmate has benefited from rights greater than those guaranteed to him by the Fourteenth Amendment.

(viii) He was afforded the right to an independent and neutral decisionmaker outside of the executive branch of government.

In accord with the single consensus holding of Ford, 47 La. L.Rev. 1351, 1355 (1987), the State of Louisiana provided a district judge to preside over the hearing. The trial judge presided throughout the entire competency hearing. (R. pp. 1-5). The State therefore submits that the inmate has been guaranteed and afforded, his procedural due process rights according to Ford.



(ix) He was afforded the privilege of judicial review.

The trial court treated this matter as an appeal of a sentence. (R. pp. 793-795). Whether or not this matter is called an appeal or a writ application, the bottom line is that the inmate is given judicial review. Unlike the Florida procedure where Ford's decision stayed within the executive branch, Perry is given the benefit of appellate level review of the neutral decisionmaker's ruling. Therefore, the State respectfully submits that the inmate has been guaranteed, and afforded, procedural due process.

In summary, Louisiana has guaranteed, and provided, a vast array of rights, benefits and privileges to Perry. These guarantees exceed that which is required by the Ford court's view of procedural due process. The remaining question concerns whether Louisiana has guaranteed something which was not provided during the course of Perry's competency hearing. That is, does Louisiana require some procedure over and above the procedure mandated by Ford?

C. Louisiana has no statutory or jurisprudential expression on what procedures must accompany the inquiry into competency to be executed.

It is axiomatic that this cause deals with a third type of competency. The trial court recognized that there are three types of competency. (R. pp. 769-771).

Quoting from the trial court's opinion:

> "First, there is 'insanity.' Article 14 of the Criminal Code provides that if the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from the criminal responsibility. This statutory mental incapacity originated from English common-law and jurisprudence; namely, the McNaughten (sic)case.
>
> The second type of mental incapacity deals with a person's competency to stand trial. This incapacity is set up by statute in Article 641 of the Code of Criminal Procedure, which provides that mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. Subsequent articles of the Code of

Criminal Procedure then provide for the manner in which the incapacity is raised, orders for mental examinations, appointment of sanity commissions, reports of sanity commissions and the determination of mental capacity to proceed. Again, however, these statutes are supported and further refined by our jurisprudence; namely, the Louisiana Supreme Court case of State versus Bennett, 345 So.2nd, 1129, Louisiana Supreme Court, 1977, wherein all the criteria are listed there for determination of a defendant's mental capacity to proceed in a criminal prosecution.

The third type of mental incapacity is now before this Court; that is, the mental capacity to proceed to execution.

Since there is no express statement by the Legislature on this subject, it appears that it will be necessary to fashion a standard through analogy with Louisiana's existing statutes and state and federal jurisprudence. This analogy will necessarily take us into the procedural scheme that should be utilized in determining the competency of an individual for execution." (R. pp. 769-771). (Emphasis supplied).

We submit that the State has fulfilled the procedural guidelines attendant to the determination of pre-trial competency to stand trial. A review of the pre-trial competency guidelines and the process afforded to this post-trial condemned inmate conclusively demonstrate the satisfaction of procedural due process.

Assuming that Code of Criminal Procedure Art. 642 et seq. afford some procedural guarantees greater than Ford, the State has met its responsibilities. The inmate has failed to meet his.

These procedural due process guarantees were met and exceeded. Therefore, the trial court's determination of competency to be executed should be upheld.

The inmate appears to intimate that the kind of process (procedural due process) necessary to protect his right (not to be executed while insane) includes the Article 641 requisite of "able to assist in his defense." Such contention is misplaced.

Article 641 is one of a series of articles which deal with pre-trial incompetency. Article 641 is the legislative articulation of a standard or prevailing test for whether an accused possesses the capacity to proceed to trial. The remaining articles provide the procedures for determining whether the standard of 641 is satisfied. Article 641 is not in and of itself a procedure, it is a standard.



The present claim deals with the procedures which are to be afforded to the inmate in determining whether he meets the Ford standard. If we assume that the pre-trial competency articles apply to the post-conviction competency (to be executed) context, then we must recognize that Article 641 is not an espousal of the procedure which governs the determination of the standard (of competence necessary to be executed).

Justice Powell recognized that the proposition requiring an inmate to be "able to assist in his defense" concerns the standard of sanity mandated by the Eighth Amendment prohibition. Ford, 106 S.Ct. at 2608, footnote 3. An inmate does not have a procedural due process right to be "able to assist in his defense." If the inmate has any claim to being "able to assist in his defense" it lies in a discussion of the standard of sanity prerequisite to a defendant's execution. See Argument VI-VII, supra. Neither Powell nor any member of the Ford court addressed the "able to assist in his defense" notion as part of the procedure necessary to enforce the right not to be executed while insane.

Since the necessity of being "able to assist" is part of a standard rather than a procedure to administer the standard, the State respectfully rejects the inmate's claim that art. 641 vests him with some procedural due process rights greater than Ford.

Essentially, Louisiana has neither statutory nor jurisprudential expression of what procedures must accompany the inquiry into competency to be executed. Since neither La. R.S. 14:14 nor La. C.Cr.P. art. 641 are specifically designed to apply to this third type of competency proceeding, we are compelled to accept the trial court's analogy to the several aforestated procedures. We submit that Ford requires a basic fairness. Basic fairness is satisfied by our statement of Ford's essence. Applying the three-pronged standard of procedural due process renders one answer: Michael Owen Perry is competent to be executed based on a hearing which afforded him (1) the right to present evidence; (2) the right to challenge the expert's opinions on competence to be executed; and (3) an independent decisionmaker. The trial court's determination of competence to be executed was based on a constitutionally appropriate hearing, therefore the finding should be affirmed.

D. The inmate has erroneously characterized the alleged trial court errors, his basis for objection and the hearing standard.

In order to address the inmate's claim of a defective hearing, we must first, however, examine the inmate's erroneous characterizations of the alleged trial court errors. It is incumbent that the record be corrected and set straight. First, the inmate's claims in brief are overstated and simply wrong. Second, the inmate's statement in his brief of objections he raised to the trial court are incorrect. Third, the inmate has fundamentally misstated the procedural due process protections required by the Ford court.

The inmate now suggests that the trial court committed various errors of constitutional proportions in the conduct of the hearing on competency to be executed. Therefore, he suggests that such errors in the hearing deprived him of his right not to be executed while insane.

1. The inmate's claims.

The inmate now claims in his brief that "other evidence" was improperly solicited and utilized by the trial court. He suggests a list of possible rights and guarantees to support his claim of error. The inmate's argument begins with the proposition that "the trial court began ex parte communication with the State. Information was provided weekly to the trial court regarding Michael." (Pet.'s brief, p. 94). From this premise he proceeds to recite his right to be free of hearsay, cross-examination, confrontation, due process, Fifth Amendment (privilege against self-incrimination), and Sixth Amendment (assistance of counsel). Pertinently, the inmate has chosen not to focus on specifics. We choose otherwise.

The dual claims of weekly reports of ex parte communications are erroneous. There is absolutely no proof that the court initiated ex parte communications with any person associated with either the Department of Justice or the Department of Corrections. The trial court's communication with the Department of Corrections was initiated by the Department of Correction Staff Attorney's Motion to File Amicus Curiae Brief. (R. p. 287). This motion was filed on June 10 and signed by the trial judge on June 13, 1988. We note that the trial court ordered copies sent to Mr. Giarrusso, counsel for Perry. (R. p. 288). The Department of Corrections sent



the amicus motion to the trial court on May 25. (R. p. 290). Attached to the motion was a cover letter and pertinent attachments. (R. pp. 289-297). From a review of these documents, it is apparent that the Department of Corrections saw a need to intervene in these proceedings on the basis that they are "the sole custodian of persons who have been sentenced to death in this state." (R. p. 287). Further, by this time of May, 1988, the Department of Corrections was in acute need of guidance as to how to attend to the inmate's mental health difficulties. By May, the Trial Court, the State of Louisiana, the Louisiana State Penitentiary Warden, the New General Hospital medical staff and the Department of Corrections Secretary were all aware of the abuse perpetrated upon the system of justice by Nordyke and Perry. At this juncture, everyone was finally aware of Nordyke's (1) Ex Parte Motion for Delegation of Decision Making Authority (R. p. 2); March 14, 1988 letter to the Louisiana State Penitentiary Warden (ordering termination of medication) (R. pp. 689-691); (3) request for videotaping of inmate only on April 20, 1988 (R. pp. 02; 592-593)("Nordyke: Your Honor, my investigator has been instructed to put the camera only on the defendant, and to leave it on the defendant, not to scan the courtroom." (Quoting from R. p. 593); and (4) calling of Perry to the witness stand as an "exhibit." (R. p. 661). In view of these actions, it was apparent that the Department of Corrections had an obligation to intervene in the matter in order to determine how they should deal with the inmate and his counsel/do-gooder.

The significance of the above recitation is to demonstrate that Department of Corrections had a duty to be in this case. The inmate's present suggestion that the Court induced their participation is erroneous. Furthermore, it is without foundation in the record.

The inmate's additional assertion that the Department of Corrections provided "weekly reports" is in need of clarification. (Pet.'s Brief, p. 94). The record of this matter contains two basic submissions of background data. First, there are the submissions which were attached to the Motion To File Amicus Curiae Brief. (R. pp. 289-297). Second, there is a two page report of July 6, 1988. (R. pp. 225-226). There are no other reports of any kind in the record which constitute the inmate's alleged "weekly reports."

The inmate contends that these reports (R. pp. 289-297 and 225-226) were unavailable to him. (Pet.'s brief p. 94).

Despite this contention, the inmate's counsel had at least two available sources for these records, not including his client. Initially, he could have bothered to review the case file; also, he could have reviewed the inmate's medical file at New General Hospital. The medical file is available to anyone who bothers to ask. For obvious reasons, the inmate's counsel did not wish to be apprised of, or acknowledge the existence of, these background reports. Specifically, if Mr. Nordyke had chosen to review and utilize February, March and April reports of the New General Hospital at Louisiana State Penitentiary, then his secret order halting Perry's medication would have been available to the State in cross-examining each of the witnesses, including the inmate, in the April 20 hearing.

2. The inmate's objections.

The inmate's counsel states that he:

> "[F]iled a written motion [cite omitted] objecting to the court receiving or relying on any such communications, citing expressly Michael's right of cross-examination, confrontation, basic due process, and Sixth Amendment concerns." (Pet.'s Brief, pp. 94-95).

The State respectfully suggests that inmate's counsel misrepresents to this Honorable Court what objections he raised to the trial court. A comparison of his "objections to the additional evidence" and the above quoted passage will reveal a fundamental misstatement. (Compare R. pp. 193-197). In the inmate's four pages of written objections to the trial court, he never once mentioned or intimated the right of confrontation. Examination of the inmate's current brief (quoted above) expressly states that "confrontation" objection was presented to the trial court. Such contention is incorrect.

3. The inmate's statement of hearing standard.

The inmate's counsel states:

> "[T]hat determinations of competence must comply with minimal due process, cross-examination and confrontation. In Ford, the concurring opinions of Justice Powell and O'Connor condemned Florida's scheme for failing to provide these protections...." (Pet.'s brief, p. 96).

We submit that such a statement mischaracterizes the opinions of both Powell and O'Connor. Neither Justice Powell nor Justice O'Connor ever opined that minimal due process



requires cross-examination and confrontation. In fact, Powell stated:

> "[t]hat ordinary adversarial procedures - complete with live testimony, cross-examination, and oral argument by counsel - are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity. Ford, 106 S.Ct. at p. 2611."

Justice O'Connor even stated:

> "[w]hile I would not invariably require oral advocacy or even cross-examination, due process at the very least requires that the decisionmaker consider the prisoner's written submissions. Id., at p. 2613."

Indeed, even Justice Marshall states:

> "We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests. Id., at p. 1606."

The inmate's contention that cross-examination and confrontation are fundamental requirements of the Ford court is unsupportable. There is no Justice who states that confrontation is a prerequisite. Even this inmate's quote in his brief reveals that the right is an "opportunity to challenge or impeach ...the [state-appointed psychiatrist's] opinions." (Pet.'s brief, p. 96). (Quoting from Ford, 106 S.Ct. at 2605.)

Seven justices appear to recognize that an inmate has a right to present psychiatric evidence on his own behalf, which will provide probative counterbalancing information to the decisionmaker. Even Justice Marshall states that "a less formal equivalent" to cross-examination may suffice to meet due process standards. Ford, 106 S.Ct. at 2605. The essence of any hearing, though, is to challenge the expert's opinions on the inmate's competency to be executed. Since competency to be executed is the sole issue, challenging of these experts' conclusions is all that Ford's version of due process requires. We respectfully submit that due process requires only that the State's expert witnesses on the ultimate issue be challenged in an adversarial context.

The inmate also suggests that Vitek v. Jones, 100 S.Ct. 1254 (1980) provides support for his contention that full adversarial proceedings are necessary. Vitek is slim support for his contention since the majority stated that:

"The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross-examine." Vitek, 100 S.Ct. at 1265.

The inmate's counsel has mischaracterized the elements requisite for a hearing to meet due process standards. He has also mischaracterized the claimed errors perpetrated by the trial court. Additionally, he has mischaracterized the objections which he preserved at the trial level. As described in sub-part "B" supra, Perry was afforded a vast array of rights and privileges at his hearing to determine competency to be executed. For these reasons, the State submits that the inmate's claims of an inadequate hearing are without merit.

E. The inmate's claims of trial court error regarding the "other evidence" lack merit.

Rather than suggesting some conclusory arguments about the alleged deprivations perpetrated by the trial court, we prefer to scrutinize the alleged errors for denials of Ford's three basic requirements (i.e., (1) right to present evidence; (2) right to challenge expert's opinions on competency to be executed; (3) right to an independent decisionmaker). A thorough and thoughtful analysis will demonstrate that the trial court's conduct of these proceedings surpassed constitutional requirements. We must first, however, begin with the inmate's erroneous characterizations of the alleged trial court errors. We must set the record straight as to the claims, argument and standard of procedural due process.

The inmate claims that the trial court's conduct of the competency hearing failed to meet constitutionally required standards of procedural due process. In support of this alleged failure he points to particular documents in the record. He suggests several broad, conclusory arguments without focusing on the particular documents and their contents.

The State respectfully suggests that the analysis should begin by recognizing what is in dispute. Basically, there are nine pages which require examination. See R., pp. 290-297 and pp. 224-226. (Also see R., pp. 81-88 for a duplicate of R., pp. 290-297). These nine pages are susceptible to grouping for analysis. First, pages 290-291 and 294 may be considered jointly. Second, pages 224-226, 292-293 and 297 may be concurrently reviewed. And third, pages 295-296 should be reviewed together since they are a single report.



1. The Record: pages 290-291 and 294.

(a) Page 290 is correspondence to Judge Hymel from the Department of Corrections staff attorney. This correspondence merely informs the trial court of the May 25th forwarding of the amicus request. It also notes that Dr. Kovac will be following up with weekly reports to the Department of Corrections staff attorney.

Page 291 is correspondence between Dr. Kovac and the Department of Corrections staff attorney. Dr. Kovac iterates that she will be providing the Department of Corrections attorney with weekly reports. Dr. Kovac also states her "observation and understanding" of Perry's status when he is on and off of medication.

Page 294 is a physician's note to the file dated April 29, 1988. This note documents a phone call which Dr. Kovac received from Mr. Nordyke. On this occasion Nordyke, as Perry's "do-gooder," grants his consent to treat Perry's mental health needs with psychotropic medication. (An apparent concession by Nordyke that Perry's mental health improves with psychotropic medication; as well as an indication that Nordyke did not want Perry medicated on the date of his testimony.).

(b) The documents described above are of incidental significance to the question of Perry's competence to be executed. The initial page (290) judges nothing. It contributes nothing. To reiterate, there was only one additional weekly report which was presented to the trial court. That report is dated July 6 and will be discussed below as pages 224-226.

It is of some significance to note that Dr. Kovac's communication was routed to the Department of Corrections staff attorney and not the trial judge. Also, Dr. Kovac preserved her beliefs in reports.

Most importantly Dr. Kovac's "observations and understanding" were similar to her testimony of September 30, 1988. (R., pp. 715; 717-718; 731-732). If there was any reason to believe that Dr. Kovac's report to the Department of Corrections attorney was an expert opinion on the ultimate issue of competency to be executed, then the inmate's counsel

had an unfettered opportunity to challenge and/or impeach her on September 30. Perry's counsel did in fact question Dr. Kovac. Instead of challenging her testimony, Mr. Nordyke's cross-examination confirmed Dr. Kovac's earlier report that Perry responds to medication and decompensates when denied medication. (R., p. 724). A review of inmate counsel's cross-examination reveals that his attempt to impeach the doctor's "observations and understanding" was ineffective.

It is ludicious for the inmate to now claim that he was denied cross-examination of Dr. Kovac. The trial court allowed him latitude to explore anything that intrigued him. (R. pp. 724-727). Inmate's counsel could have even explored his present allegation that Dr. Kovac provided weekly reports to the trial court. For unknown and unexplained reasons he chose not to even explore this area with Dr. Kovac.

In regard to Dr. Kovac's note of April 29 to the medical file of Perry, it is nonsense to suggest that Perry has been denied cross-examination of this document's declarant, for his own lawyer is the declarant. Further, should there be some significance to this note, Dr. Kovac was available to answer any questions inmate's counsel may have had. Apparently he had none, for he chose to ask no questions.

The State respectfully submits that the presence of these documents in the record fails to prove the inmate's claim of a constitutionally inadequate hearing to determine his competency to be executed. The inmate was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue; and his right to a fair decisionmaker.

2. The record: Pages 225-226; 292-293; and 297.

(a) Pages 292-293 are a report by a clinical social worker at the penitentiary. The report is addressed to Dr. Kovac. It is dated May 25, 1988 and was prepared at the request of the Department of Corrections staff attorney. The report specifically addresses three questions . They are (1) what behavior does Perry exhibit when taking medicine; (2) what behavior does he exhibit when he initially halts his medicine; and (3) what behavior does he exhibit when he receives no medicine over an extended period of time. The answers to each of these questions is quite predictable, especially in view of the experts' testimony.



Page 297 is a mere three-sentence note to Perry's medical file by his clinical social worker, dated March 23, 1988. The single sentence of any importance states "[h]e appears to be in fair remission at this time." It is difficult to construe this document as either dispositive of or weighing on the question of Perry's competence to be executed. Simply put, this page is of little relevance.

Pages 225-226 are a July 6 report of the same clinical social worker mentioned above. This particular report is addressed to Lawrence Rivet, Louisiana State Penitentiary Mental Health Director. The report is in response to a request for information tendered by the Department of Correction Staff Attorney. This report asks three questions, too. They are: (1) Is Perry currently taking medication; (2) is he manageable on medication; and (3) what is his present mental status?

(b) Both reports, May 25, 1988 and July 6, 1988, cover the same subject matter. That is, they describe the behavior of Perry while on and off of psychotropic medication. The answers to these questions are (1) based on medical records which were available to the inmate prior to the hearing and at each hearing; and (2) based on observations of the experts who did in fact testify subject to cross-examination. Moreover, the observations recorded in each report only mimic the experts' in-court testimony.

On September 30, 1988, Dr. Kovac testified with Perry's medical file in her lap. (R. pp. 716-718). If the inmate's counsel wished to inquire about the contents of either of these reports, he could have addressed his questions to the New General Hospital medical director. Dr. Kovac's stated responsibilities included supervision of the mental health unit. (R. p. 714). The reports of the clinical social worker were directed to her and through her. She was in a position to answer questions of the inmate's counsel. They chose not to examine Dr. Kovac on these reports.

Of greater significance is the fact that both of these social worker reports only mimic the experts' testimony. Dr. Jimenez recognized and testified that Perry's condition improves and stabilizes when on medication and worsens when removed from medication. (R. pp. 519-520 & 524). Similarly Dr. Cox stated that the medication can determine the answer to the question of "what is Perry's behavior on and off of the

medication." (See R. pp 56; 58-61; 67; 70-72 & 76-77). Likewise, even the psychologist Dr. Curtis Vincent admitted that psychotropic medication could improve his condition. ( R. pp. 621-622). He made this conclusion despite his lack of training in pharmacology.

Since the experts' answers are of greater value and import to the trial court then the above social worker's reports, there is no reason to require cross-examination of the social worker. Her reports are merely cumulative. If any error occurred it was harmless and mitigated by the fact that the trial court was in a position to appreciate the value of the psychiatrists' testimony versus that of a social worker.

In Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986), the United States Supreme Court held that a violation of the defendant's right of confrontation was subject to a harmless error analysis under Chapman v. California, 87 S.Ct. 824 (1967). The Court guided us in determining when errors may be harmless beyond a reasonable doubt by stating:

> "Whether such an error is harmless in a particular case depends upon a host of factors....these factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Id., at 1438.

Initially, we must presume that we are in a setting which carries the protection of the confrontation clause. From our discussion above of the type of hearing necessary to comport with due process, we now assume that the social worker's reports violated a Sixth Amendment right of confrontation. Assuming the application of the "Sixth Amendment right of confrontation" and the fact that a violation occurred, we suggest that the error was harmless beyond a reasonable doubt.

The bottom line is that neither the report of March 25 nor the report of July 6, 1988 addresses the ultimate issue of competency to be executed. They deal with the tangential question of treatment and its effect. Each of the disputed reports relies on the prisoner's medical file and the diagnosis of Dr. Cox, who did appear and testify twice subject to



cross-examination. Also, it must be recognized that Perry was afforded access to compulsory process. Had he deemed it necessary to cross-examine the social worker, he could have issued a subpoena to compel her appearance and testimony. It must additionally be recognized that the trial court did not prohibit cross-examination. Compare Van Arsdall, supra, p. 1435. As now Chief Justice Rehnquist stated in Van Arsdall:

> "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. (Quoting from Delaware v. Fensterer, 106 S.Ct. 292, 295) (per curiam) (emphasis in original).

We submit that the inmate had the opportunity for effective cross-examination if he had chosen to exercise his privilege of compulsory process. Since he chose not to produce the testimony of the social worker, he cannot stand to claim that he has suffered a constitutional error.

In regard to the harmless error test, we believe that the use of these reports was incidental in view of the experts' testimony on the same subject matter. In light of the remaining evidence and the fact that Perry was afforded unlimited cross-examination of the experts, the reports were cumulative and therefore harmless error. See e.g., State v. Walters, 514 So.2d 257 (La. App. 5 Cir. 1987).

In brief, the inmate suggests that these social worker reports are in violation of La. C.Cr.P. art. 647. (Pet.'s brief, p. 96). He suggests that art. 647 vests him with the right to cross-examine the maker of the two disputed reports.

This argument lacks merit. Perusal of art. 647 demonstrates why. The article pertinently provides:

> "Regardless of who calls them as witnesses, the members of the [sanity] commission are subject to cross-examination by the defense, by the district attorney and by the court."

It is expressly provided that sanity commission members are to be subjected to cross-examination. The purpose in subjecting the sanity commission members to cross-examination is obvious. It is a test of their expert opinions on the ultimate issue of competence. Such a test is unnecessary in regard to the reports of March 25 and July 6, 1988 since neither report

purports to issue an opinion on the issue of Perry's competency to be executed. The reports are merely background information. They give no hint of an opinion that Perry is competent to be executed. Furthermore, there is no indication in the record that these reports were given undue weight by the trial court. In fact, the judge's ruling in this case relied only on the testimony of Doctors Cox, Jimenez, Estes, Vincent and Kovac. (R. pp. 766-792).

In conclusion, we respectfully submit that the presence of these reports in the record fails to prove the inmate's claim of a constitutionally inadequate hearing. The inmate was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed; and his right to a fair decisionmaker. The inmate enjoyed a hearing which guaranteed basic fairness to him. Therefore, this Honorable Court should conclude that the inmate's allegation lacks merit.

3. The record: pages 295-296.

(a) Pages 295-296 constitute a report dated March 25, 1988. The report is written on a New General Hospital "mental health team progress notes" form. It is drafted and recorded by Randy Parent, a social worker assigned to the care of Perry. The report is based on an emergency room conversation between Perry and Parent. Parent spoke with Perry in the emergency room at the request of Dr. Kovac.

This emergency room report contains statements of Perry about his medical condition, medical treatment, diagnosis, lawyers, competency hearing and electrocution. Also, this emergency room report contains some medical observations of Perry by social worker Parent, in order to assess his medical condition.

The inmate claims constitutional error in the presence of this report in the record. He now objects on the basis of (i) hearsay, (ii) confrontation, (iii) cross-examination, (iv) privilege against self-incrimination and (v) the right to counsel.

(b) (i) Hearsay.



This report, accurately depicted, is non-hearsay within hearsay. See La. C.E. arts. 801, 802, 803; compare 805. The statements of Perry to Parent are non-hearsay. La. C.E. 801(D)(2)(a) and comments to art. 801 (D)(2). Sub-part (D) of art. 801 provides that:

> "A statement is not hearsay if: [2] [T]he statement is offered against a party and is: (a) his own statement, in either his individual or a representative capacity."

The comment indicates that this provision does not change Louisiana's prior law. Perry's statements are non-hearsay for the obvious fact that he "should not be permitted to object 'that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath.'" C.E., Comments to art. 801(D)(2).

Social worker Parent's report, which recorded the inmate's statements, is arguably hearsay. C.E. 801(A) and (C). Argument can be made that Parent's report was not offered in evidence to prove the truth of the matter asserted (i.e., that Perry's lawyers told him not to take his medication, as opposed to the report used to establish Perry's competence to be executed). Accepting for the moment that Parent's report is indeed hearsay, we submit that it falls within an exception to C.E. art. 802. See C.E. art. 803(4).

Code of Evidence article 803(4) provides that:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (4) Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment."

We respectfully submit that the March 25 report of social worker Parent was properly received into evidence of this matter. Simply put, Perry's statements to social worker Parent were non-hearsay. The social worker's report is hearsay, but falls within a well-recognized exception where the availability of the declarant is immaterial.

Comments to Code of Evidence art. 803 (4) provide that the declarant (in this situation - Parent) "need not be the patient for this Paragraph to apply." See 4 J. Weinstein and M. Burger, Weinstein's Evidence Section 803 (4)[01], see 803-150. Furthermore, the commentators opined that "[T]he person to whom the statement is made need not be a physician for this Paragraph to apply...." These comments lend support to our contention that Perry's comments to the social worker were properly admitted into evidence. First, it is significant that Perry made the statements while obtaining medical treatment in the New General Hospital emergency room. Second, he was being examined at the request of supervisory physician Kay Kovac. Third, he was examined for purposes of diagnosis and treatment. This conclusion is bolstered by the fact that the social worker ended his report by "A:" [assessment] and "P:", [plan], indicators that the social worker examined Perry for medical purposes. Fourth, 803(4) recognizes that the declarant can be any person with firsthand knowledge of that which he was reporting on. And fifth, a social worker is an acceptable person to obtain the information necessary for diagnosis and treatment. Id., at 803-150.

We respectfully suggest that social worker Parent's report of March 25, 1988 did not violate the inmate's right of cross-examination. It must be recognized that we are in a post-conviction competency hearing context. We are not in a post-accusation adversarial context. Thus, as Justices Powell and O'Connor suggest, the need for adversarial proceedings is accordingly reduced. We believe that there is no need to require cross-examination of a social worker like Parent. As trial Judge Hymel recognized (R. p. 771) and even this Court in State v. Perry, (supra, pp. 563-564), the procedural articles of 642 et seq. must be used as persuasive analogies. If we look to art. 647, it is defensible to require that only the experts' opinions on competency should necessarily be subjected to cross-examination. Even Vitek, supra, at 1264-1265, recognizes that there may be instances in which pragmatic considerations dictate limits on cross-examination. We submit that this Honorable Court should recognize that there is no need to cross-examine a witness who does not render an expert opinion on the ultimate issue of competency to be executed.

The State submits that the presence of the March 25 social worker report fails to prove the inmate's claim of a



constitutionally inadequate hearing. The inmate was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed; and his right to a fair decisionmaker. The inmate enjoyed a hearing which guaranteed basic fairness to him. Therefore, this Honorable Court should conclude that the inmate's allegation lacks merit.

(ii) Confrontation.

(a) In criminal cases, the admission of an out-of-court statement must also satisfy the confrontation requirement. U.S. Const. Amend. VI. Thus, beyond the above argument that the March 25 report is admissible hearsay, we must address the Confrontation Clause. It has been recognized that the hearsay rule is not coextensive with the confrontation requirement. California v. Green, 90 S.Ct. 1930, 1933-1934(1970). Therefore, we are compelled to address the question of: Does the Sixth Amendment guarantee of Confrontation apply in a post-conviction competency hearing; and if so, to what extent?

The Sixth Amendment pertinently states:

> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

As Justice Black stated in Pointer v. Texas, 85 S.Ct. 1065 (1965):

> "[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." Id. at 1069.

The State of Louisiana respectfully suggests that the confrontation clause applies, in a limited fashion, to the post-conviction hearing on the issue of competency to be executed. It is obvious to even the casual observer that the Sixth Amendment guarantee applies to "criminal prosecutions" where an "accused" can confront "the witnesses against him." At present, Perry is not (1) the subject of a criminal prosecution; (2) an accused; or (3) facing witnesses against him in the literal sense. Also, to apply the guarantee of confrontation to a post-conviction competency context is to hoist the policy anchor which stabilizes the Sixth Amendment's

confrontation guarantee. We therefore suggest that the guarantee, at best, applies in a limited fashion. Jurisprudence recognizes that there may be limits placed on the Sixth Amendment's guarantee of confrontation.

We prefer to look to United States Supreme Court jurisprudence which recognizes that:

> "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers v. Mississippi, 93 S.Ct. 1038, 1045 (1973).

Justice Blackmun has written:

> "The court, however, has recognized that competing interests, if 'closel, examined,' Chambers v. Mississippi, 410 M.S., at 295, 93 S.Ct. at 1045, may warrant dispensing with confrontation at trial. See Mattox v. U.S., 156 U.S. at 243, 15 S.Ct. at 340 ('general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case')." Ohio v. Roberts, 100 S.Ct. 2531, 2538.

Finally, Justice White has also recognized that limitations may be placed on the Sixth Amendment. He stated in Vitek, supra:

> "The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross-examine." Id. at 1265.

In view of Chambers, Mattox, Roberts, and Vitek, we believe that the trial court reasonably limited the inmate's right of confrontation to the experts who rendered opinions on his competency to be executed. Since the March 25 report of Parent was not an expert opinion on the heart of the issue, there was no need to require either confrontation or cross-examination. For pragmatic reasons (such as limiting the testimony to experts so as to avoid requiring the entire medical staff to leave their station to attend court) we therefore suggest that the trial court had good reason to limit confrontation to the expert witnesses who rendered opinions on competency. Thus, the State proposes that the Confrontation Clause applies in the present competency hearing context only insofar as the experts opinions on the ultimate issue of competency to be executed. Since the social worker's report of March 25 is not an expert opinion, the inmate's contention of an unconstitutionally conducted hearing lacks merit.



(b) If we assume that the inmate has a right to confront social worker Parent regarding his March 25 report, then the State submits that Perry failed to properly preserve his objection. La. C.Cr.P. art. 841 states:

> "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. It is sufficient that a party, ... makes known to the Court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor."

The inmate objected on several grounds. (R. pp. 194-197). Nowhere in these four pages is there mention of the right of confrontation. Only now, on appeal, does the inmate specifically allege a confrontation violation. (Pet.'s brief, p. 94). Since the inmate failed to preserve his objection on grounds of the Confrontation Clause, this Honorable Court lacks the authority to review his claim. See, e.g., State v. Richmond, 464 So.2d 430, writ den. 467 So.2d 535. The inmates claim of trial court error therefore lacks merit.

(c) If we assume that the inmate has a right to confront the social worker regarding his March 25 report, and that the inmate has preserved his objection, then we believe that no error has occurred. It is axiomatic that the inmate received the privilege of compulsory process. (R. pp. 1, 688, 747, 762). Compulsory process in this inmate's case allowed him to subpoena medical records and four experts. He was also given at least three opportunities to present evidence by utilizing either subpoenas or subpoena duces tecums. His counsel chose to do neither on each occasion. The trial court imposed no limitations on the inmate's ability to compel the production of either documents or testimony. He, in fact, specifically requested if the inmate's counsel wished to present evidence. Of even greater significance is the fact that each of the opportunities given to the inmate to compel testimony occurred after March 25, 1988, the date of Parent's report.

The United States Supreme Court views the Sixth Amendment guarantee of confrontation as "secur[ing] for the opponent the opportunity to cross-examination." Davis v. Alaska, 94 S.Ct. 1105, 1109-1110 (1974). This notion of the confrontation clause guaranteeing an opportunity for

cross-examination has been reaffirmed in Roberts, supra, at 2541, and more recently in U.S. v. Owens, 108 S.Ct. 838, 842 (1988). Additionally, this Honorable Court has concurred in this view of the Sixth Amendment and La. Const. art. 1, §16. See State v. Donald, 440 So.2d. 682, writ den. 443 So.2d 1126 (La. App. 2 Cir. 1983) and State v. Hillard, 398 So.2d 1057 (La. 1981).

In Donald, the defendant contended that the trial court erred in failing to require the state to produce the rape victim at trial, in violation of his Sixth Amendment, and art. 1, §16, rights to confront and cross-examine his accuser. The appellate court concluded that no confrontation violation occurred. The rationale for this conclusion of the appellate court was:

> "In any case the defense was at liberty to summon the victim to testify at trial, and failed to do so.... Furthermore, he was afforded full opportunity to cross-examine those witnesses who did testify against him. Under the circumstances we find no merit to the defendant's suggestion that his right of confrontation has been abridged." Donald, 440 So.2d at 866.

Inmate Perry finds himself in a predicament similar to that of Donald, cited above. He contends that the trial court failed to compel the state to produce Randy Parent, the maker of the March 25 report. He has, however, failed to explain why he chose not to call the witness on any of the occasions available to him. Perry was afforded the opportunity for cross-examination. He chose to forego it; he should therefore be held to suffer the consequence for not utilizing the available compulsory process. Moreover, it should be recognized that this inmate's situation is not one where he was denied an opportunity for cross-examination. Compare Chambers v. Mississippi, supra, at 1047 and Hillard, supra, at pp. 1059-1060. The State respectfully suggests that Perry's claim of violation of confrontation is lacking in merit.

(d) If this Honorable Court concludes that Perry was denied his right of confrontation by the trial court's conduct of these proceedings, then we proffer that it was harmless error. As stated in Argument XI(E)(2), the United States Supreme Court established a harmless error test for Sixth Amendment violations. Van Arsdall, supra. Some of the factors to be examined in determining whether an error was harmless are



the importance of the testimony, a cumulative nature, corroborating testimony, cross-examination otherwise permitted, and strength of the case. The March 25, 1988 report of social worker Parent is not important in the trial court's decision. It does not purport to determine Perry's competence to be executed through an expert's analysis. Although the report does indicate that Perry understands the competency proceedings, this fact was established by Doctors Jimenez, Cox and Vincent on April 20; Doctors Cox and Kovac on September 30; and Dr. Jimenez on October 21, 1988. Undoubtedly, the facts as stated in social worker Parent's report are cumulative when compared to the doctors' respective expert testimony. The doctors individually and collectively prove and corroborate the facts recorded in the March 25 report. Furthermore, the corroborated facts were subjected to unrestricted cross-examination by the inmate's several counsel. The Parent report's significance is reduced even further by the existence of Mr. Nordyke's March 14, 1988 letter to the Louisiana State Penitentiary Warden. This letter, similar to the March 25 report of Parent, reveals the treachery of inmate and his attorney to undermine the integrity of the competency proceedings. Additionally, there is no proof that the disputed report influenced the trial court's decision on Perry's competency to be executed. Judge Hymel made no mention of the report in his reasons for judgment. Finally, we suggest that there is ample evidence in the form of expert testimony which demonstrates the strength of the State's proof and the inadequacy of the inmate's proof. As stated in Arguments I-VIII, the experts testified that Perry understands the nature of the death penalty and why it is to be imposed upon him. In view of the strength of the State's proof, the cumulative nature of the Parent report, and the unlimited cross-examination of the experts afforded to Perry, the State respectfully suggests that Perry has failed to prove the report's admission was anything but harmless error. Wherefore, the inmate's allegation of a constitutionally inadequate competency hearing should be rejected.

(iii) Cross-Examination.

The Sixth Amendment, in regard to all criminal prosecutions, provides that "the accused shall enjoy the right to be confronted with the witnesses against him." Inmate Perry contends that he was denied his right to cross-examine social

worker Parent concerning the March 25 report. Based upon his denial of the ability to cross-examine Parent, he then demands that this court conclude that the competency hearing was unconstitutionally conducted. We respectfully contend that the inmate's allegation lacks merit since he was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed; and his right to a fair decisionmaker. Specifically, we believe that any violation of a cross-examination right is meritless because cross-examination is subsumed within the right of confrontation and, in this case: (1) the confrontation clause has limited applicability in a post-conviction competency hearing; (2) the inmate failed to properly preserve his confrontation objections; (3) the inmate failed to exercise his right of compulsory process; and (4) any error committed was harmless.

The Sixth Amendment's guarantee of confrontation does not mention a "right of cross-examination." The jurisprudential gloss on the right of confrontation does, however, indicate the role of cross-examination in our system of criminal justice. In Pointer, supra, Justice Black stated:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." Id., at 1068. (Emphasis supplied).

Also see Ohio v. Roberts, supra, at 2537, and, State in Interest of R.C. JR., 514 So.2d 759 762 (La. App. 2 Cir. 1987).

Pointer and Roberts recognize that the right of cross-examination is subsumed within the Sixth Amendment's guarantee of confrontation. Since cross-examination is an outgrowth of and subsumed within the concept of confrontation, it is only natural to consider a cross-examination violation if there was a right of confrontation. We suggest that Perry had no right to confront Parent about the March 25 report. Further, we wish to incorporate herein our arguments in Argument XI(E)(3)(b)(ii) sub-paragraphs (a), (b), (c) and (d), all in regard to confrontation. We respectfully suggest that inmate Perry suffered no denial of right of cross-examination since, at the least, he could have examined Dr. Kovac about her subordinate Parent and the March 25 report. Further, inmate Perry could have chosen to subpoena Parent on at least three



occasions. Also, it should be noted that inmate Perry has not endured any denial like that of the accused in Chambers, supra, at 1049, since Perry was neither denied the right to present witnesses nor the right to examine Parent on whatever subjects he desired. Moreover, inmate Perry has erred in claiming a cross-examination violation since he failed to properly object on the basis of confrontation. Finally, neither this State nor the Fourteenth Amendment's due process clause have yet required that a death row inmate is entitled to cross-examine anyone but the experts who give opinions on competency.

The State submits that inmate Perry received a competency hearing which was basically fair. A standard of basic fairness is all that is required. In view of the totality of the hearing circumstances we urge this Honorable Court to conclude that the trial court conducted a constitutionally adequate competency hearing.

(iv) Fifth Amendment Prohibition Against Self-Incrimination.

The inmate now claims that the social worker's March 25 report violated his privilege against self-incrimination. Recapitulating, Parent's emergency room report included some statements of Perry about his medication, sanity hearing of April 20, his lawyers, and the electric chair. The report also included the social worker's observations of Perry's then existing physical and mental status. The date of this report is approximately three weeks after the competency interviews of Doctors Cox, Jimenez, Vincent and Estes, but, it is approximately four weeks before the competency hearing of April 20, 1988. Further, the report's existence was not discovered until four weeks after the April 20 hearing. The report was submitted to the Court with the Department of Corrections's amicus brief. (R. pp. 290-297).

In regard to the inmate's claims of Fifth and Sixth Amendment violations, the State herein incorporates by reference our arguments previously presented to the trial court. (R. pp. 213-217; 250-273). Rather than repeating the arguments tendered to the trial court, we now take this opportunity to examine some previously unexplored terrain. Namely, does the Fifth Amendment prohibition against self-incrimination apply to a post-conviction competency hearing? And if so, was Parent's March 25 report a violation of the privilege?

In regard to the applicability of the privilege to the present setting (post-conviction competency hearing), we suggest that there is no authority to now apply the privilege. Specifically, nothing in the several opinions of Ford indicates a Fifth Amendment protection at this stage of the proceedings.

We respectfully suggest that Perry has no right to assert the Fifth Amendment privilege in the present post-conviction competency hearing. In Reina v. United States, 81 S.Ct. 260, 264 (1960), the Court stated that there is "weighty authority" for the proposition that "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime...." Perry's conversation with Parent does not invite future incrimination since the trial of guilt and penalty are "final" in the appellate sense of the word. If, for some unknown reason, there is to be a future trial on either guilt or the penalty then the proper remedy would be to suppress the March 25 report i[illegible] use at trial. There is simply no reason why we should conclude that the Fifth Amendment privilege applies during a post-conviction, post direct-appeal competency hearing.

The question at present is -- how far does the Fifth Amendment reach? We suggest that a line must be drawn at the point where the defendant has been tried, convicted, sentenced to death and exhausted direct appellate review. We are compelled to ask -- what interest is being advanced by affording the privilege to an inmate who awaits execution? Is there an actual possibility that what the inmate says during the psychiatrist's interview will lead to future proceedings?

In Taylor v. Best, 746 F.2d 220 (4 Cir. 1984), the Fourth Circuit stated:

> "[T]he fifth amendment 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answer might incriminate him in future proceedings?' [cite omitted]. Rather than basing the availability of the privilege on the type of proceeding in which it was involved, we must base it on 'the nature of the statement or admission and the exposure which it invites.' [Cites omitted] (Emphasis supplied)." Taylor, supra, at 223.



We believe that the questions asked by Parent and answered by Perry on March 25, 1988, were not of the type which invite future criminal proceedings. That is, the statements do not indicate a crime, a civil cause of action, or any other exposure which dictates sanctions.

In Taylor, the inmate refused to answer questions put to him by a prison psychologist as part of the prison's routine initial screening. Taylor was questioned about his crime and conviction by the prison psychologist for assessment purposes. Taylor was not given any Miranda warnings. Taylor argued that requiring him to answer questions about his crime violated his right against self-incrimination because he was in the process of appealing his conviction. The Court looked to the purpose of the examination (i.e., to evaluate prisoner's custody, treatment, and training needs) to conclude that the right to assert the Fifth Amendment privilege had not been "triggered." The court went on to state that if the evaluation were to be used in a "subsequent criminal proceeding" (i.e., "a sentencing hearing as in Estelle and the analogous parole hearing") that "Taylor would be entitled to have the evaluation suppressed if its content were offered against him and if Taylor had not otherwise waived the right. [Cite omitted]." Taylor, Id., at 224.

We believe that Perry's comments to social worker Parent were made at a time when the Fifth Amendment was not triggered. The privilege had not been triggered since Parent's questions were for a purpose unrelated to "subsequent criminal proceedings." Compare Estelle v. Smith, supra, (where defendant had not been yet sentenced or afforded direct appellate review). Further, if the State attempts to improperly utilize the information it is subject to review for the inmate's waiver of his right, suppression and harmless error analysis. See, also, State In Interest of Bruno, 388 So.2d 784 (La. 1980). Recapitulating, there is no authority to extend the applicability of the Fifth Amendment privilege to a post-conviction competency hearing. The conversation between Perry and social worker Parent was not of the type which invites exposure in a "subsequent criminal proceeding," since Perry has already been tried, convicted, sentenced to death and exhausted direct appellate review.

Finally, if we assume that (1) the Fifth Amendment privilege applies during a post-conviction competency hearing; (2) that the statements made to the social worker were compelled by state action; and (3) that the statements were incriminating; then, we contend that the inmate waived his privilege by invoking inquiry into his competency and presenting arguments in support thereof.

The Fifth Amendment privilege against self-incrimination protects an individual from being compelled by the state to provide evidence against himself. In the present circumstances, it must first be recognized that Perry was not compelled to speak with the social worker. Second, the social worker was under no order to conduct the conversation, it merely happened in the routine practice of penitentiary medicine. Third, the prisoner chose to speak during the pendency of a sanity inquiry he invoked and from which he hopes to benefit.

A review of the March 25 report reveals that Perry was brought to the emergency room for medical treatment. Perry was never told that he had to answer any questions. The report itself indicates that the conversation was conducted for the purpose of ascertaining his then existing medical status. There is no indication whatsoever that the social worker knew of the pending sanity hearing until Perry mentioned it. The conversation of this date proceeded exactly like many that occurred before and after this particular date.

We must also consider the fact that Perry has asserted his incompetency and introduced evidence in support of his claim. To allow him to deny the State the opportunity to rebut his claim with relevant evidence is to permit, albeit encourage, fraudulent assertions of mental incompetency.

In Estelle v. Smith, 101 S.Ct. 1866 (1981), the Court held that a court-ordered psychiatric examination of the pre-trial defendant amounted to interrogation. Therefore, the Court found that the statements made during such an examination were inadmissible as a violation of Miranda v. Arizona, 86 S.Ct. 1602 (1966). However, the Court in Buchanan v. Kentucky, 107 S.Ct. 2906 (1987), limited Estelle to its specific facts. Id. at 2917. The Court noted that when a defendant asserts the insanity defense, introduces supporting psychiatric testimony,



or requests a psychiatric examination, he has no Fifth Amendment privilege against the introduction of the psychiatric testimony by the prosecution. Id., at 2917-2918. In Buchanan the court held that the introduction of other psychiatric reports concerning the defendant's mental state for rebuttal evidence did not violate the Fifth Amendment.

In the case at bar, there is no evidence that Perry was compelled to submit to the talk with the social worker. Further, Perry's situation significantly differs from that of Smith. First, Smith had not even begun his trial proceedings when the statements were elicited from him, and, he was in his penalty phase when the statements were utilized against him. In Perry's case, the statements were made post-trial, post-conviction and post-appellate review. Further distinguishing Perry is the fact that the statements are being used as rebuttal to a claim of incompetency where proof in support thereof has been produced by the inmate. In addition, social worker Parent has simply fulfilled his ordinary duties. There is no indication that he acted as an "agent of the state" attempting to subvert the inmate's assumed right not to speak.

In Smith, supra, the Court opined:

> "Nor was the interview [by Dr. Grigson of Smith] analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [cites omitted]." Id., at 1874. (Emphasis added).

In Smith, the defendant neither tendered an insanity claim nor produced evidence in support thereof. Thus, the Court was constrained to find that the defendant had not waived his Fifth Amendment privilege and the statements made to the psychiatrist were therefore in violation of the Miranda prophylactic rule. In contrast, Perry did initiate sanity proceedings. Since Perry initiated the proceedings, he is necessarily construed to have waived his Fifth Amendment privilege, there is no duty to inform him of Miranda warnings prior to communications with him

about his competency. In view of the fact that no Fifth Amendment privilege existed, the March 25 report of Parent was not in violation of Perry's privilege against self-incrimination.

In Vardas v. Estelle, 715 F.2d 206 (5 Cir. 1983), the Court reaffirmed Battie v. Estelle, 655 F.2d 692 (5 Cir. 1981), wherein the court stated "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's Fifth Amendment privilege.... [Cite omitted]." Vardas, supra, at 209.

More recently in Schneider v. Lynaugh, 835 F.2d 570 (5 Cir. 1988), Judge Rubin stated:

> "[A] defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind -- as involving a 'waiver' of Fifth Amendment rights, [Footnote omitted] ...." Id., at 575.

Finally, in State v. Jones, 359 So.2d 95 (La. 1978), Justice Tate stated that:

> "[T]he privilege against self incrimination does not apply against requiring the accused to participate in a sanity commission. Lafave & Scott, Criminal Law, Section 340, pp. 310-312 (1972). The reason is often grounded upon a limited waiver of the privilege, for the limited purposes of the sanity commission." Id., at 97. (Emphasis provided).

In each of the above cases, there is recognition that a defendant relying upon a claim of incompetency can be compelled to submit to state interviews on the subject. Simply put, the defendant has forfeited his right to the privilege against self-incrimination during the pendency of and scope of a determination of competency. If the State can compel a pre-trial defendant to submit to a state psychiatric examination, a-fortiori, the State can utilize Perry's voluntary statements of March 25 to social worker Parent.

Basically, on March 25 the State could have compelled Perry to discuss his competency with Parent. By this date, Perry had already claimed incompetency, subpoenaed medical records, and the doctors had already interviewed him. The State did not compel Perry to speak with Parent. Conversely,



the State did not require Parent to interview Perry. The conversation was a spontaneous, routine conversation between a mental health team worker and Perry. If this conversation had been elicited by state design, then surely it would have been in the State's arsenal of cross-examination at the April 20 hearing. Since the State did not utilize the March 25 report at the April 20 hearing, it is obvious that there has been no attempt by the State to trick or deceive the inmate and there has been no state compulsion by Parent of Perry. Essentially, we now suggest that if the State could have compelled the March 25 conversation, then certainly Perry could have voluntarily engaged in the conversation.

If we permit Perry to claim a Fifth Amendment privilege as to the March 25 report of the social worker, then we are subverting the values underlying the privilege. As Judge Rubin stated:

> "[T]he principle [of waiver by a defendant who puts his mental state at issue] relects the court's attempts to maintain a 'fair state-individual balance,' a value underlying the privilege itself. [Cite omitted]. It is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. [Cite omitted] The principle also rests on 'the need to prevent fraudulent mental defenses.'" [Cite omitted]. Schneider v. Lynaugh, supra, at 575-576.

At present we have Perry claiming that the March 25 report is inadmissible as a violation of his privilege against self-incrimination. We submit that such claim is misplaced since he has waived the privilege by instituting the current competency proceeding. (R. p.001-1; and the Motions of Mr. Nordyke which were sealed in the record on January 21, 1988). Further, if we are to accept the claimed privilege then we ignore the policy underlying the privilege, that is to maintain a fair individual-state balance. To omit the March 25 report is to constrain the trial judge's decision to the brief examinations of the sanity commission appointees -- to so limit the trial judge's factual input is to contravene the Ford court's hope that all relevant evidence will be available to the decisionmaker. Further, to so limit the trial judge's factual input is to contravene "the need to prevent fraudulent mental defenses." As Dr. Cox stated in part, we can determine the true existence of mental illness by observing an individual

over an extended period of time. (R. p. 565-566). A lengthy observation will facilitate an accurate determination for it is difficult for an individual to feign illness around the clock over a course of weeks or months. To omit consideration of the March 25 report is to deny the decisionmaker an opportunity to make a truly informed decision on Perry's competency to be executed. We respectfully suggest that the March 25 report meaningfully advances the Fifth Amendment policy of preventing fraudulent mental defenses. Therefore, we submit that the inmate's claim of an unconstitutionally conducted hearing lacks merit.

The inmate received a competency hearing which was basically fair. He was afforded the right to present evidence; the right to challenge and/or impeach the state's experts' opinions on the ultimate issue of competency to be executed; and he was afforded a fair decisionmaker. We urge this Honorable Court to reject Perry's contention that he possessed a Fifth Amendment privilege in regard to the March 25 report of social worker Parent.

(v) Sixth Amendment right to assistance of counsel.

The inmate's final claim of infirmity regarding the trial court's admission of the March 25 report is the Sixth Amendment right of counsel. Perry now claims that he had a right to counsel that was violated by Parent's conversation of March 25.

This issue has been previously discussed by the State. (R. pp.213-217; 250-273). The prior discussion is herein incorporated by reference. Rather than repeat the same arguments, we will limit our present discussion to previously unconsidered matters.

In order to reach the issue - of whether Parent's March 25 conversation with Perry was a violation of the Sixth Amendment guarantee of assistance of counsel - several predicate obstacles must be hurdled. First, we must assume that the Sixth Amendment guarantees counsel during a post-trial, post-direct appeal, post-conviction competency hearing. Second, we must assume that Parent's interview was a product of either court or state order. Third, we must assume that Perry's counsel had neither actual nor constructive notice



that such an interview would occur. Fourth, we must assume that the inmate's claim of incompetency and related proof do not constitute a waiver of the Sixth Amendment right to the assistance of counsel.

First, we respectfully suggest that there is no authority which requires that Perry be provided with counsel during a post-conviction competency hearing. The only arguable authority is C.Cr.P. art. 930.7(B). See, contra, Giarratano v. Murray, 847 F.2d 1118 (Cir. 4 1988), writ granted, 888-411, 44 Cr. L. 4061 (Oct. 31, 1988).

Second, we respectfully suggest that Perry's conversation with Parent significantly differs from Estelle v. Smith, supra, and others. In the present case, there is absolutely no compulsion by the State to require the conversation. The plain and simple truth is that the inmate's counsel removed him from treatment on March 15, ten days prior to Parent's conversation. Because of inmate counsel's actions, it was inevitable that Perry would decompensate. The decompensation, as many times before, led to the hospitalization of Perry in the New General Hospital. And, as many times before, the hospitalization for decompensation led to the emergency room physicians asking for a mental health team progress report on Perry's mental status. As one would normally expect, the conversation naturally turned to the status of Perry's medication. Thus, we have the present March 25, 1988 report of social worker Parent. We suggest that this scenario indicates no state coercion in obtaining the March 25 report, therefore, the Sixth Amendment should not bar its utilization in this Court's review of this matter.

Third, we suggest that Perry's counsel had either actual or constructive notice that Parent's March 25 conversation with Perry would occur. The notice necessarily stems from Nordyke's March 14 secret letter to the Louisiana State Penitentiary warden. Said letter ordered the immediate termination of all medication prior to the April 20 hearing. We believe that Nordyke's termination of Perry's medication placed him on notice that Perry would decompensate to a point where someone would ask why he was not taking his medicine. By placing Perry in such a position, inmate's counsel must be held to have recognized that future contact with the penitentiary's medical personnel w[illegible]t, and that a conversation like that of March 2[illegible]y to occur.

In State v. Comeaux, 514 So.2d 84 (La. 1987), this Honorable Court interpreted the Sixth Amendment to require the State "to give defense counsel notice of its intent to examine defendant." Id., at 99. In a footnote, this court recognized the Estelle v. Smith, supra, at 1874, notion of an implied waiver when a defendant puts his mental condition at issue.

We likewise believe that Perry has put his mental condition at issue and his counsel has precipitated the conversation of March 25. Thus, this court should conclude that no Sixth Amendment violation occurred when Perry voluntarily chose to speak to social worker Parent during the pendency of an examination he initiated and hoped to use as a loophole to execution. This inmate and his counsel knew, because of their own acts of March 14, that psychiatric type examinations and discussions would occur.

Fourth, we suggest that the inmate's claim of incompetency and related proof constitute a waiver of the Sixth Amendment right to the assistance of counsel. Accord Vardas v. Estelle, supra, and Schneider v. Lynaugh, supra.

If each of the above four obstacles are hurdled, then we urge this Honorable Court to embrace Satterwhite v. Texas, 108 S.Ct. 1792 (1988).

In Satterwhite, supra, the Supreme Court considered whether it was harmless error to introduce psychiatric testimony obtained in violation of Estelle v. Smith, supra (i.e., defendants formally charged with capital crimes have a sixth amendment right to consult with counsel before submitting to psychiatric examinations designed to determine future dangerousness). The court held that:

> "[T]he Chapman harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in Estelle v. Smith." 108 S.Ct., at 1798.

The Court stated that the harmless error rule:

> "[P]romotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Id., at 1797, (Quoting from Delaware v. Van Arsdall).

The court considered the relevant harmless error question to be "whether the State has proved 'beyond a



reasonable doubt that the error complained of did not contribute to the verdict obtained.' Chapman, 386 U.S., at 24." Satterwhite, 108 S.Ct., at 1798. In order to answer this question, the Satterwhite Court scrutinized the evidence introduced to determine if it contributed to the verdict obtained. Dr. Grigson was the state's final witness. Grigson stated his educational background in psychiatry. He stated, among other things, that Satterwhite was a "continuing threat to society;" Satterwhite had a "lack of conscience;" was as "severe a sociopath as you can be;" on a scale of one to ten "Satterwhite is a 'ten plus;'" and he told the jury that "Satterwhite was beyond the reach of psychiatric rehabilitation." Satterwhite, 108 S.Ct. at 1799. In Satterwhite's case, the Court found that Dr. Grigson's disputed testimony was "powerful and unequivocal," thus the court concluded "we find it impossible to say beyond a reasonable doubt that Dr. Girgson's expert testimony on the issue ... did not influence the sentencing jury." Satterwhite, 108 S.Ct., at 1799.

In the present case of inmate Perry and the March 25 report of social worker Parent, it is difficult to conclude that the report is so "powerful and unequivocal" as to say that the trial court's ruling is flawed. We respectfully suggest that Parent's report did not contribute to the verdict obtained. The report pales in significance when compared to the testimony of Doctors Cox, Jimenez and Kovac. Each of these experts found Perry to be competent to be executed. Dr. Jimenez revealed Perry's wish not to die, his comparison of himself to Charles Manson; and Dr. Kovac stated Perry's acknowledgement that "if I take the pills I die, if I don't I live." All of that which exists in the disputed report appears multiple times in the record of these proceedings. Perry uttered identical statements, thoughts and beliefs to each expert as he did to social worker Parent. We submit that Parent's report does not nearly equal that of Dr. Grigson in Satterwhite, supra, and therefore, the State has proven beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

We respectfully urge this Honorable Court to conclude that the trial court's conduct of these proceedings surpassed all constitutional requirements and, accordingly, the trial court's determination of competency to be executed is correct.

## CONCLUSION

It is easy to become totally absorbed by the logic and persuasion of legal arguments, especially in a brief which spans two-hundred pages and considers res nova issues. We must not, however, forget what brought us here. If we do, humanity is lost. The fact is, that five innocent, kind and simple souls have prematurely departed this life. To remain aloof and forget that Michael Perry took the lives of those who loved and cared for him is to forfeit our pathos. Each of us must feel some sorrow for the tragedy that occurred and the naked truth that a cousin, an uncle, a son - Michael Perry - senselessly consigned five family members to unexpected, early graves. It does not make sense. None of us can explain why it happened. Chances are that none of us could have prevented what happened. Reality is that we cannot return them to this life. The future is ----- justice now.

Burned into my memory are certain recollections of this case. Recollections like watching adult jurors weep when listening to testimony; cry when examining the evidence; sob as the verdicts were returned; and console one another as they completed their civic and moral responsibilities. Indelibly etched in my memory are the moments when those of us who presented the case cried with the jurors.

The scars seared in the memories of family members, witnesses, jurors, court personnel and casual observers will never be erased. We can only pray that they will fade. Our pathos must sustain us, but not jade us. Likewise, our logos must guide us, but not blind us. We must resist the urge to claim the right to vengeance as we must resist the urge to blindly focus on either the merits or demerits of the death penalty. The temptation to now focus exclusively on Michael Perry is not just; nor is the temptation to invoke the memories of slain family-members. What is just, however, is fidelity to our system of laws, which must remain blind. Our laws allow for and dictate a penalty of death in this matter. We beseech you to consider this case with a pragmatic sense of what is just. With such consideration, we are confident that the trial court's decision will be affirmed.



STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

## AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared RENE' SALOMON, who, being by me duly sworn, deposed that the foregoing response on behalf of the State of Louisiana to death row inmate's writ application for supervisory and remedial writs from a post-conviction competency ruling is true to the best of his knowledge and belief; and that a copy of this brief has been forwarded to the Honorable L. J. Hymel, 19th Judicial District Court, and all counsel of record in this case by depositing same in the U. S. Mail, postage prepaid.

Baton Rouge, Louisiana, this 29th day of March, 1989

René Salomon
AFFIANT

NOTARY PUBLIC

Katie DeLaneuville
WITNESS

Anthony G. Buzbee
WITNESS